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CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Common Pleas and Exchequer Chamber,

AND IN

The House of Lords;

FROM

HILARY TERM, 1833, TO MICHAELMAS TERM, 1833.

BY

JOHN BAYLY MOORE, ESQ.; AND JOHN SCOTT, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. III.

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OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., Lord Chief Justice.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Hon. Sir EDWARD HALL ALDERSON, Knt.

A

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ERRATA.

Page 239, line 18, for "*Adams*" read "*Andrews.*"
—— 778, marginal note, line 18, for "defendant" read "plaintiff."

In the Exchequer Chamber.

HILARY TERM, 3 WILL. IV.

BALME and Others, Assignees of BANKHART and BENSON, Bankrupts, *v.* HUTTON, Esq., JEWISON, INGHAM, WOOD, and Others.

1833. *Tuesday, Jan. 22nd.*

[*In Error.*]

THIS was an action of trover by the plaintiffs, assignees of Messrs. Bankhart and Benson, bankrupts, against Hutton, the late sheriff of the county of York, Jewison, the chief bailiff of the hundred of Pontefract, a liberty within the county of York, Ingham, deputy-bailiff, and Messrs. Wood & Co., judgment-creditors of the bankrupts. The cause was twice tried; on the last occasion, before Mr. Justice Bayley, at the Summer Assizes for the county of York, in 1830, when the jury returned a special verdict to the following effect:—

The sheriff seized the goods of a defendant under a *fi. fa.*, and sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:—*Held*, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen.

C. Bankhart and William Benson, the bankrupts, for several years before and up to the time of the issuing the commission hereinafter mentioned, carried on the business of worsted spinners in partnership, at Bowling, within the honour of Pontefract, in the county of York. On the 27th day of October, 1825, Bankhart and Benson were indebted to the defendants, H. W. Wood, J. W. Wood, and M. W. Wood, in a sum of money exceeding 3,500*l.* for wool sold and delivered; and, upon that day, at the request of

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the said Messrs. Wood, executed a warrant of attorney for securing that sum and such further advances as in the whole should amount to a sum not exceeding 5,000*l.*; which warrant of attorney was filed within twenty-one days from the date thereof, pursuant to the statute 6 Geo. 4, c. 16; and judgment by *nil dicit* was entered up thereon on the 14th November following. On the 31st December, 1825, the said C. Bankhart and W. Benson, being traders, and indebted to the petitioning-creditor in a debt sufficient to support the after-mentioned commission, committed an act of bankruptcy. On the 25th January, 1826, the defendant Ingham (Jewison then being chief bailiff of the honour of Pontefract, within which honour he has the execution of all writs, and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from the acts of such deputies), by virtue of a warrant directed to Jewison and his deputy (Ingham), by the defendant Hutton, the then sheriff of the county of York, founded on a writ of *fieri facias* issued at the suit of the defendants, H. W. Wood, J. W. Wood, and M. W. Wood, against the said bankrupts under the judgment aforesaid, returnable on Monday next after eight days of the Purification, and indorsed to levy 1,521*l.* 12*s.* 10*d.*, besides poundage and expenses, seized in execution certain machinery and utensils of the bankrupts in a mill occupied by them at Bowling aforesaid. On the same day, a valuation of the said machinery and utensils, together with the bankrupts' tenant-right in the said mill, was made by the defendant Ingham, amounting altogether to the sum of 1,485*l.*; and the said machinery and utensils and tenant-right were on that day purchased at such valuation from the said Ingham, acting on behalf of the said chief bailiff, by one Barker, a clerk or book-keeper of the said Messrs. Wood; but no money was paid by Barker or the Woods to Ingham, except the sheriff's poundage, and other costs of the levy. Immediately upon the sale, Barker took possession of the

mill, machinery, and utensils, on behalf of Messrs. Wood, and retained possession until the 17th February following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.* (the tenant-right in the mill remaining unsold, but being of little or no value); and the proceeds of such sale were paid over by Barker to Messrs. Wood. On the day of the sale to Barker, Messrs. Wood agreed to indemnify the defendant Ingham from any action for making the levy; and a bond of indemnity was afterwards executed. On the 21st February, 1826, a commission of bankrupt issued against Bankhart and Benson, under which they were declared bankrupts on the 24th of the same month. Neither the sheriff, nor the chief bailiff, nor Ingham, knew or had any notice of any act of bankruptcy committed by Bankhart and Benson before the return of the writ of *fieri facias*.

The special verdict then proceeded to find Jewison and Ingham guilty or not according to the opinion of the Court; and it then found Hutton not guilty, and Wood and the other defendants guilty.

The case came on for argument in Trinity Term, 1831, and, in the Michaelmas Term following, the judgment of the Court of Exchequer was delivered by the Lord Chief Baron Lyndhurst—deciding, as to Jewison and Ingham, that the verdict should be entered for the former and against the latter; on the ground that Ingham, the deputy bailiff, having taken an indemnity from the execution-creditors, had thereby identified himself with them (*a*).

The plaintiffs afterwards sued out a writ of error to remove the cause into the Exchequer Chamber, where, after full argument, and time taken to consider, seven of the Judges on this day delivered their opinions *seriatim*.

Mr. Justice PATTESON.—This was an action of trover,

(*a*) See 2 Cromp. & Jervis, 19; S. C. 1 Tyr. 17.

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in which the jury have found a special verdict as above set out. The Court of Exchequer has given a very elaborate judgment, and has decided that the verdict should be entered for the defendant Jewison, and against the defendant Ingham; upon which judgment a writ of error has been brought. The decision against the defendant Ingham proceeds on the ground that he, being the bailiff who executed the writ of *fieri facias*, took an indemnity from the execution-creditors, and is therefore identified with them. But the Court held that the defendant Jewison, the chief bailiff, whose officer Ingham was, is not affected by this circumstance. I confess, it appears to me, as at present advised, that, if Ingham be identified with the execution-creditors, in consequence of what he has done in the course of executing the writ, Jewison is so likewise. Jewison would be liable for all acts done by Ingham as officer; even for any extortion committed by Ingham, although contrary to his express orders. Jewison can have the benefit of the indemnity taken by Ingham, and is, in my apprehension, exactly in the same condition as Ingham. However, as the other point in the case is the most important one, I will proceed to examine it, having stated only thus much on the point of indemnity, lest I should be supposed to agree entirely with the Court of Exchequer upon it. The principal question, then, is this—Is a sheriff liable to an action of trover at the suit of the assignees of a bankrupt, where, upon a *fieri facias* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant, he seizes and sells? I am of opinion that he is liable. It has been so considered for a great length of time; and, though I admit that the case of *Cooper* v. *Chitty*, reported by Burrow (*a*), and much more intelligibly, as I think, by Lord Kenyon (*b*), does not neces-

(*a*) 1 Burr. 20.

(*b*) 1 Lord Kenyon's Notes, 395; also reported in 1 Sir W. Blac. 65.

sarily decide the point; because, in that case, the sheriff sold the goods after a commission of bankrupt had issued; yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question. Accordingly, in the case of *Lazarus* v. *Waithman* (*a*), the Court of Common Pleas expressly so held; and in that case the old authorities, and particularly *Bayly* v. *Bunning* (*b*), were cited by counsel. Afterwards, in *Price* v. *Helyar* (*c*), the Court of Common Pleas again decided in the same manner on the same ground; and, according to the report in Moore & Payne, the counsel for the defendant cited *Bayly* v. *Bunning*. The Court of Exchequer had also held the same doctrine some time before, in the case of *Potter* v. *Starkie* (*d*). I do not think it necessary to enter into a full examination of the reasoning of Lord Mansfield, in *Cooper* v. *Chitty*. I agree in much, though not in all, that is said on that subject, in the judgment of the Court of Exchequer in this case; but I dissent from the conclusion which is drawn in that judgment. Looking at the subsequent authorities, and at the uniform practice in modern times, I cannot consider this question as *res integra*, and should not think myself justified in over-ruling the decisions of so many learned Judges, even if I felt that, in the absence of such decisions, my view of the law would probably be different. But I by no means say that it would be different. The first authority, viz. *Bayly* v. *Bunning*, is cited as having determined the point the other way. Now, if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Bayly* v. *Bunning*, badly and imperfectly reported as it is in Levinz, in Siderfin, and in Keble, and impossible as I find it to satisfy my mind on

(*a*) 5 J. B. Moore, 313.

(*b*) 1 Lev. 173; 1 Sid. 271; 2 Keb. 32.

(*c*) 1 Moore & Payne, 541; S.C. 4 Bing. 597.

(*d*) Cited in 4 Mau. & Selw. 260, and also in *Lazarus* v. *Waithman*, 5 J. B. Moore, 313.

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what ground the Court, in that case, really did proceed. The special verdict in that case, which was an action of trover against the judgment-creditor and the bailiff of a liberty having the execution of writs, is plainly imperfect; for it finds only a demand and refusal, but not a conversion: whereas it is common learning that a demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion (*a*). Again, the verdict puts the question on the *taking;* and, according to the reports, it would seem that the Court proceeded on the ground that the *taking* was not unlawful, which is frequently not the real point in trover; for, the taking may be lawful, and yet there may be a subsequent unlawful conversion. [The learned Judge here referred to the translation of the *postea* from the original roll in *Bayly* v. *Bunning*, which had been procured for the Judges (*b*).]

(*a*) See *Hayward* v. *Seaward*, *ante*, vol. 1, p. 459.

(*b*) The following is the finding of the jury here referred to:—And the jurors say, upon their oath, that the said W. Mawley is not guilty of the premises within laid to his charge, as the said W. Mawley has within, for himself, in pleading, alleged; and the jurors aforesaid, upon their aforesaid oath, further say, that the said W. Mawley, in Trinity Term, in the 14th year of the reign of our Lord Charles the Second, the now King of England, in the Court of the Bench of our said Lord the King, at Westminster, by the consideration of the said Court, recovered against one John Eaton a certain debt of 152*l.*; also 60*s.* for the damages &c., as by the record &c.; and the jurors aforesaid, on their aforesaid oath, further say, that, on the sixth day of June, in the above-mentioned fourteenth year of the reign of our said Lord the now King &c., at &c., the said John Eaton became a bankrupt, within the several statutes against bankrupts made and provided, and that the said John Eaton then and there was possessed of the monies, goods, and chattels, in the within count mentioned; and the aforesaid jurors, upon their said oath, further say, that a writ of *fieri facias* of our said Lord the now King, directed to the sheriff of Northampton, issued from the said Court of the Bench at Westminster, upon the judgment aforesaid, by which writ also it was commanded the said sheriff of Northamptonshire, that of the goods and chattels of the said John Eaton, in his bailiwick, he should cause to be made, as well

The verdict is general—not guilty, as regards the execution-creditor; and rightly so, for it is not found that he in-

the aforesaid debt of 152*l.*, which the said W. Mawley, in the said Court of Common Bench, at Westminster, before the Justices of that Court, recovered against him, as the aforesaid 60*s.*, which were adjudged, &c.; and that he should have those monies before the Justices of our Lord the King at Westminster, in three weeks from the day of St. Michael then next ensuing, to render to the aforesaid William for his debt and damages aforesaid; and which writ is tested at Westminster, the fourth day of June, in the fourteenth year aforesaid, but, in truth and in fact, the same writ was actually made and issued out of the same Court the eleventh day of June in the same year, being in the vacation after Trinity Term in the same year, and not before; and the aforesaid jurors, upon their said oath, further say, that afterwards, and before the return of the said writ of *fieri facias*, to wit, on the twelfth day of June, in the above-mentioned fourteenth year of the reign of our said Lord the now King, &c., at &c., the aforesaid William Mawley delivered to William Addams, Esq. (the then sheriff of the said county of Northampton), the aforesaid writ, to be executed in due form of law; and for the execution of which writ the same sheriff then and there made and directed a certain warrant under the seal of his office to the bailiff of the said sheriff of the liberty of the hundred of Polebrooke, in the same county. [It then set forth the warrant.] By virtue of which warrant and writ aforesaid, the said Thomas Bonynge (being the bailiff of the hundred of Polebrooke aforesaid) afterwards, and before the return of the said writ, to wit, on the fourteenth day of June, in the aforesaid fourteenth year of the reign, &c., caused to be made the goods, chattels, and monies, in the within-written count mentioned, and which goods, chattels, and monies, still remain in the hands of the said Thomas Bonynge, neither sold nor delivered to the said William Mawley; and the jurors aforesaid, upon their oath aforesaid, further say, that afterwards, to wit, on the seventeenth day of July, on the petition of the aforesaid Richard Baylis (the now plaintiff), and of other creditors of the aforesaid John Eaton, a certain commission under the great seal of England, bearing date that same day and year, duly issued from the Court of Chancery at Westminster, in the county of Middlesex. [It then set out the commission, and an assignment by the commissioners to Richard Baylis, the plaintiff.] And the jurors aforesaid, upon their oath aforesaid, further say, that, after the making of the aforesaid indenture of assignment, and after the executing of the writ of execution aforesaid, and before the exhibition of the within-contained bill of the aforesaid Richard Baylis, the aforesaid

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terfered in the seizure; and it is expressly found that the goods still remained in the bailiff's hands, not sold or delivered over to the execution-creditor; and yet *Bayly* v. *Bunning* has been mentioned by Levinz as an authority to shew that the officer shall not be charged, where perhaps the *party* shall—so inaccurate are the reports of that day respecting this case, and so conclusive, to my mind, that no reliance can be placed on *Bayly* v. *Bunning* as establishing any point at all. *Lechmere* v. *Thorowgood* (*a*) has been cited; but, if possible, it is worse reported than *Bayly* v. *Bunning*. The only point there was, that a man shall not be made a trespasser by relation; a point confirmed in *Smith* v. *Milles* (*b*). The decision in the action of trover

Richard Baylis demanded of the aforesaid Thomas Bonynge the monies, goods, and chattels, in the within count mentioned; and that the aforesaid Thomas Bonynge refused, upon his request, to deliver those monies, goods, and chattels to the aforesaid Richard Baylis. But whether, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, the monies, goods, and chattels aforesaid were well taken by the aforesaid Thomas Bonynge, by virtue of the aforesaid writ of execution, the jurors aforesaid are altogether ignorant; and thereof they pray the advice and consideration of the Court of our Lord the King now here; and if, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall seem to the Court here that the monies, goods, and chattels, were not rightly taken by the said Thomas Bonynge, by virtue of the writ of execution, then the jurors aforesaid say, upon their oath aforesaid, that the said Thomas Bonynge is guilty of the premises within laid to his charge; and in that case they assess the damages of the said Richard Baylis, by reason of the within-mentioned premises, besides his costs and charges by him about his suit in this behalf expended, at 160*l.*; and for those costs and charges, at 53*s.* 4*d.*; and if, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall seem to the Court of our Lord the King now here, that the monies, goods, and chattels aforesaid were rightly taken by the aforesaid Thomas Bonynge, by virtue of the aforesaid writ of execution, then the jurors aforesaid say, upon their oath, that the said Thomas Bonynge is not guilty of the premises within laid to his charge, as he the same Thomas Bonynge has within for himself in pleading alleged.

(*a*) Comb. 123; 3 Mod. 236; 1 Show. 12.

(*b*) 1 Term Rep. 475.

afterwards brought in *Lechmere* v. *Toplady* (*a*) is plainly bad law. *Cole* v. *Davies* (*b*) is but a *Nisi Prius* decision.

Take this case, then, upon legal principles, independent of all authority. The bankrupt acts say that the commissioners shall deal with all the personal property of the bankrupt, of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold that the property was in the assignees by relation from the time of the act of bankruptcy; otherwise, there would have been no mode of recovering the personal property which had been disposed of between the act of bankruptcy and the assignment. This relation is created by the statutes of bankrupt, in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in these statutes. Now, the action of trover, which is the form of the present action, is founded on property; and, as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action, subject always to the limitation of two months, introduced by the statute 49 Geo. 3, c. 121, s. 2. All the cases, from the time of the bankrupt acts of Elizabeth and James the First, shew this; and, indeed, it is on this principle only that the Court of Exchequer, in the present case, have given judgment against the execution-creditors and the bailiff Ingham. The action of trespass is very different; it is founded, not on property, but on possession; and, where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass. Here he had no

(*a*) 2 Ventris, 156, 169. (*b*) Lord Raym. 725.

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such right, except by relation; and the cases establish that a man shall not be made a trespasser by relation. There is reason in such rule; for, in trespass, the damages are unlimited; in trover, they are limited to the value of the property. It being, therefore, clear, that the plaintiffs had, by relation, such a property as would maintain trover against all persons but the king, the question in this case, as it seems to me, is reduced to this, whether the character of the sheriff affords a defence to the action. The bankrupt acts contain no clause protecting the sheriff; they speak of all persons being bound who claim under the bankrupt: but it is contended that the sheriff does not claim under the bankrupt; yet it is admitted that the execution-creditor, who puts the sheriff in motion, does claim under the bankrupt, and that the vendee of the sheriff also claims under him. I cannot assent to this doctrine at all. It is said to be hard on the sheriff; but, if the law be clear, any hardship arising from it is immaterial (*a*): and it is not found practically hard; for, the offices of under-sheriff and of bound-bailiff are coveted, notwithstanding the hardship which has prevailed many years. It is said that the sheriff is invincibly ignorant of the facts; so is the execution-creditor; yet he is not excused if he join in the execution: ignorance, therefore, alone, will not do. Again, the sheriff is often as invincibly ignorant in cases of bills of sale which are set up against executions, in which the point is, whether they be fraudulent or not; yet he is obliged to run the risk: nay, more, where he knows of an act of bankruptcy, he is still obliged to seize under a *fieri facias*, and formerly was obliged to sell, for, *non constat* that any commission will issue; which is quite as hard as being obliged to act in ignorance. Whatever hardship he may have been under formerly, he is under very little

(*a*) See the judgment of Lord Chief Justice Best (now Lord Wynford), in *Price* v. *Helyar*, 1 Moore & Payne, 541.

since the 49 Geo. 3, c. 121: he can always inquire whether any act of bankruptcy has been committed; and if he has reason to suspect that there has, he can apply to the Court for protection for two months, after which he is safe. But it is said that the law in other cases makes a distinction between a sheriff and a party; as, for instance, that a sheriff may justify under a *writ* of execution, but the party must shew not only a writ but a subsisting judgment. No doubt that is so; and why? Because the party in the cause, who is liable only in case he has been personally active in the seizure, or has taken the goods or their produce from the sheriff, yet having put the sheriff in motion, *i. e.* having sued out the writ, if he become liable at all, must shew a cause for suing out the writ; and it is obvious that the writ itself would shew no cause: whereas the sheriff does nothing till after the writ is put into his hands, and acts professedly in obedience to the writ. The difference in the requisites of a justification between the sheriff and the party, arises, not from the character of the sheriff, but from the stage of the proceedings at which they respectively interfere. The writ commands the sheriff to take the goods of A.; he takes goods which had been the property of A., and are still in his possession, though, in point of law, they have ceased to be his property, if certain contingent events happen; but no other person at that time has the right of possession: the sheriff, therefore, is not liable to be sued in *trespass* by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure: neither is the execution-creditor liable in *trespass;* but both the sheriff and the creditor, if he takes the proceeds, are liable in trover to render the value of the goods to the person whose property they turn out to be. I see neither hardship nor injustice in this, nor any thing contrary to the usual course and maxims of the law. If, then, this were *res integra,* I should think the sheriff

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liable: much more do I think so, when I find the modern authorities so deciding, even if I were satisfied, which *I am not*, that the more antient authorities are the other way. I am therefore of opinion that the judgment of the Court of Exchequer, in this case, as regards the defendant Jewison, ought to be reversed.

Mr. Justice TAUNTON.—Two questions have been raised on behalf of the defendants in error in this case—the one, that the property in the goods and chattels seized remained in the bankrupts, Bankhart & Benson, until the assignment by the commissioners under the commission of bankrupt; that, at the time of the seizure, therefore, they were their goods and chattels; that, in making the seizure Jewison, the chief bailiff of the honour, and Ingham, his deputy, were acting in strict obedience to the writ of *fieri facias*, which commanded them of the goods and chattels of Bankhart & Benson to make the money to be levied; and, therefore, that Jewison (for, of Ingham there was no question, in consequence of his having taken an indemnity from the judgment-creditors) is not liable to this action. The other question was, whether, admitting the doctrine of relation to be applicable to the judgment-creditors, it could be so with respect to Jewison, who was a public officer, and supposed to be entitled to peculiar protection, and not capable of being considered as a wrong-doer, when acting in obedience to his writ, and in ignorance of any act of bankruptcy committed. If either of these questions be answered in favour of the defendants in error, the judgment ought to be affirmed: but, upon a full consideration of the subject, I am of opinion that both points are against them, and that the judgment of the Court below ought to be reversed.

In giving my reasons for the conclusion at which I have arrived, I do not mean to go into the cases at any length. They are so fully discussed in the very learned

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and elaborate judgment of the Court of Exchequer, and the subject itself, speaking generally, is so familiar to the mind of every lawyer, that this is wholly unnecessary.

Upon the first point, I admit that the property in the goods, according to the case of *Carey* v. *Crisp* (*a*), is not transferred out of the bankrupt before assignment by the commissioners; but, though this be so, it is most clear, and has been settled by a long series of decisions, that, when an assignment is made under a good commission of bankrupt, it relates back to the act of bankruptcy committed, and avoids all mesne acts. The law on this subject is thus stated by Lord Hardwicke, in the case of *Billon* v. *Hyde* (*b*)—" By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time; and it overcharges all those acts, without regard to the fairness or fraud in them. So that a sale of goods by the bankrupt after the act committed is a sale of their property, for which they may maintain trover. So it is as to the payment of money: and this was the intent of the act of parliament; the statute of Jac. 1, being, ' that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it.' This relation the assignment has, does not only overcharge acts done *in pais*, and contracts entered into by such person having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments; so that, if execution is taken out after the act committed, upon a judgment before, that execution is undone and set aside. It is said that this rule founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one; which is a

(*a*) 1 Salk. 108. (*b*) 1 Ves. sen. 328.

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general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience: and the legislature foresaw there would be a particular mischief, which they cured by that proviso; but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts; so, as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Lord Mansfield, in *Cooper* v. *Chitty*, expresses himself in these words (*a*)—"This relation, the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for, the old statutes consider him as a criminal); they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt *after* the act of bankruptcy, and against all executions not served and executed *before* the act of bankruptcy." It must be particularly recollected that this relation takes effect, not from the common law, but by statute; and the necessary result is, that though, at the time of the execution executed, goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been and have continued to be so, notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon; yet, if a good commission be taken out, and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment, is considered as possessing himself of the property of the as-

(*a*) 1 Burr. 31.

signees. He, therefore, whether judgment-creditor, or sheriff, or bailiff, or any other person, who, in such a case, takes the goods apparently of A., the bankrupt, has, in legal effect, taken possession of the goods of B., the person who afterwards becomes assignee, and is liable to an action at the suit of B., the subsequent assignee, for so doing, unless he be protected by some peculiar privilege.

This brings me to the second question—whether a sheriff has such a privilege; so that, under the same circumstances, ignorance of any act of bankruptcy committed being one, the judgment-creditor will be liable, and the sheriff will not. It is said that he has, because he is the king's officer, and that he is acting only in obedience to the writ, which he is obliged to execute. Now, if there be an exception to the general rule in the instance of a sheriff, it is an implied one, for there is none to be found in the statute. The words of the 6 Geo. 4, c. 16, s. 12, which are the same as those in the 13 Eliz. c. 7, s. 2, are general, that the commissioners shall have full power and authority to take order and direction of all the bankrupt's lands which he shall have in his own right before he became bankrupt, and of all his money, goods, chattels, &c., and to make sale thereof, or otherwise to order the same, for satisfaction and payment of the creditors. I confess, I can see no necessity for making this exception in favour of the sheriff. He is the immediate officer of the king and all his Courts, to execute the writs of the common law; and, for doing this, he is entitled, on the one hand, to certain allowances and fees, and subject, on the other, to many perils and liabilities; and to these perils and liabilities, though they may, in particular instances, work great injustice, he is exposed for the public good. If we were to confine the liabilities of sheriffs to cases of personal misconduct or default in them or their officers, we should overturn the settled administration of law upon this subject, and throw every thing into confusion.

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Nothing can be more severe than the responsibility of the sheriff in the case of bail. If he refuses sufficient bail, he may have an action brought against him by the defendant; and, if he takes it, and the defendant in the suit does not appear according to the exigency of the writ, which he can only do by putting in and justifying bail above, he may be attached by the plaintiff. So, he is identified with the bailiffs, and liable for all their acts, though beyond the scope of their authority and contrary to their duty, as, voluntary escapes, extortion, and the like. In the one instance, without the means of knowledge, he is bound to judge of the sufficiency of persons tendering themselves as bail; and, in the other, he is driven to protect himself by a bond from sureties for the good conduct of his officers, and to rely for indemnity upon such security, which may turn out to be worthless. So, in executing process, whether against the person or against the goods, he acts at his peril, and is responsible if he makes any mistake, however innocently, with respect to the identity of the person or the property. This has been carried so far, that, in a case where he had seized goods under a *fi. fa.* against A., in a house where A. and the plaintiff lived together as man and wife, and the plaintiff afterwards discovered, that, when she intermarried with A., he had another wife living, it was held that the plaintiff might recover the value of the goods against the sheriff, they having been her property before the marriage, it not appearing that the plaintiff knew, at the time of the execution, that A. had another wife living—*Glasspoole* v. *Young* (*a*). All this apparent injustice has its origin in, and can be excused only by, the apprehension of the numberless frauds, oppressions, and inconveniences that would otherwise ensue. But, in favour of the sheriff, upon this occasion, the case of *Bayly* v. *Bunning* (*b*) has been cited. I admit this case, as

(*a*) 9 Barn. & Cress. 696. (*b*) 1 Lev. 173; Sid. 271; 2 Keb. 32.

reported in Levinz, to be *primâ facie* an authority for the sheriff, though, in Siderfin, the reporter subjoins a query, with this remark—"For it was affirmed that the practice is, that the bailiff shall be found guilty if the party was then a bankrupt." But it may be observed, that this appears to have been the first case decided upon this point of relation after the statutes 13 Eliz., 1 Jac. 1, and 21 Jac. 1, and was decided at the time when the bankrupt law was not moulded, partly by decisions of Courts of justice, and partly by subsequent statutes, into that more perfect system which it afterwards attained. It is still more material to observe, that, on referring to the original record, it appears that the special verdict does not expressly find any conversion by the defendant Bonynge. The action was trover against the judgment-creditor, Mawley, and the officer, Bonynge. The former was found not guilty; and, with respect to the latter, the jury found, that, by virtue of the warrant and writ, he caused to be made the goods, chattels, and monies in the count mentioned, and which goods, chattels, and monies still remain in the hands of the said Thomas Bonynge, neither sold nor delivered to the said William Mawley. They afterwards further said, that Richard Baylis (the plaintiff) demanded of the said Thomas Bonynge the monies, goods, and chattels in the count mentioned, and that the said Thomas Bonynge refused, upon his request, to deliver them to Baylis: but whether, upon all the matters found, the monies, goods, and chattels aforesaid were well *taken* by Bonynge by virtue of the writ of execution, the jurors are ignorant, and pray the advice and consideration of the Court; and if it shall seem to the Court they were not rightly taken, then Thomas Bonynge is guilty of the premises laid to his charge; but, if rightly taken, then not guilty. A demand and refusal, therefore, are found, but no sale or express conversion; and the question referred to the Court is merely as to the taking. This, I think, considerably impugns the

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authority of the case, inasmuch as the conversion, which is the gist of the action, is not found; and, from the contradictory accounts of the several reports of this case, it is difficult to ascertain the ground of the decision. The case of *Turner* v. *Felgate* (*a*), was also cited as illustrating, by the reporter's note, and not by the decision itself, the difference between charging the officer and charging the party. It was there held, though Mr. Justice Twysden was not satisfied, that the party who levied upon a judgment that was afterwards vacated, was a trespasser by relation. This was the only point decided; and the reporter subjoins a note of observation, that the action was brought against the party, and not against the sheriff, who had the king's writ for his guarantee; and refers to *Bayly* v. *Bunning*. This case, therefore, and that also of *Philips* v. *Thompson* (*b*), in which the ground of the decision in *Bayly* v. *Bunning* is simply stated, are not additional authorities, because this very point was not adjudged in either. Of *Lechmere* v. *Thorowgood* (*c*), it is sufficient to say that the form of action there was trespass, and not trover; and the only point decided was, that a man shall not be made a trespasser by relation; and it is a very different thing to make a sheriff answerable in trover, where the value of the property only is the usual measure of damages, and in trespass, where circumstances of aggravation may swell their amount. It by no means follows of necessity that the Court would have holden that trover would not lie because they held that trespass did not; though it is probable, that, at that day, founding themselves upon *Bayly* v. *Bunning*, they might have so held; and it is not immaterial to observe that the distinction in this respect between trespass and trover is particularly pointed out by Lord Mansfield in the case of *Cooper* v.

(*a*) 1 Lev. 95.
(*b*) 3 Lev. 193.
(*c*) Comb. 123; 3 Mod. 236; 1 Show. 12.

Chitty, and is the precise ground of decision in the case of *Smith* v. *Milles* (*a*). As to the case of *Cole* v. *Davies* (*b*), Lord Mansfield, in *Cooper* v. *Chitty*, says (*c*):—"These notes were taken when Lord Raymond was young, as short hints for his own use; but they are too incorrect and inaccurate to be relied on as authorities." And the resolution relied on in the present case is considered by him not to have been warranted by the case then in judgment, but to have been a mere obiter reference to the determination in *Bayly* v. *Bunning*. In *Aldridge* v. *Ireland* (*d*), it was not necessary to decide this question, although it arose, the sheriff having been indemnified; and the same observation, that there was no decision on this point, may be applied to *Coppendale* v. *Bridgen* (*e*); although, if one were inclined critically to examine the language used by part of the Court (Mr. Justice *Foster*), if the sheriff there had returned *nulla bona* on the day of the return of the writ, that would not have been a false return, though the act of bankruptcy on that day was incomplete; because the relation is made to be to the time of the first arrest, by the express words of the statute. But I by no means rely upon this, inasmuch as the other Judges had doubts upon the point. The case, then, of *Bayly* v. *Bunning*, such as it is in Levinz, is, in effect, the only one solitary decision purporting expressly to be in favour of the officer. I agree that, according to the report of the case of *Cooper* v. *Chitty*, in Burrow, that case is no authority for the present. Lord Mansfield there is reported to have made two points—first, whether or not there was sufficient property in the plaintiffs, as assignees, to enable them to maintain the action—secondly, whether the defendants had been guilty of a wrongful conversion; and the decision turned upon this, that the sale having been

(*a*) 1 Term Rep. 475.
(*b*) 1 Ld. Raym. 724.
(*c*) 1 Burr. 36.
(*d*) 1 Taunt. 273, n.
(*e*) 2 Burr. 814.

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after the commission and assignment, which were both notorious transactions, the conversion was wrongful. It is true, that, in Blackstone's report of the case (*a*), Lord Mansfield is reported to have said—"But, had the sale been immediately after the seizure, still the sheriff would have been liable." Of these reports, that of Burrow is probably the more correct, as it is certainly the most elaborate, and perhaps received the correction of Lord Mansfield himself. But, notwithstanding *Cooper* v. *Chitty* be no direct authority against the sheriff in a case where the seizure and sale are both *before* the commission or notice of it, yet it appears to me to be pretty clear, that, soon after that case, an opinion grew up in the profession, that the sheriff was equally answerable in both cases, upon the ground that, from the act of bankruptcy, the property, by relation, vests in the assignees, and that any sale or disposition of it afterwards, without their privity, must be a wrongful conversion, by whomsoever made. The observations which fell from the Court in *Kitchen* v. *Campbell* (*b*), determined in Trinity Term, 12 Geo. 3, only sixteen years after the decision of *Cooper* v. *Chitty*, afford strong proof of this; and in *Lazarus* v. *Waithman* (*c*), which was an action of trover against the sheriff, where the seizure and sale were both before the issuing of the commission, Mr. Justice Burrough, who spoke from very long experience, said, the point was settled long before he knew Westminster-Hall. I consider this case and *Potter* v. *Starkie* (*d*) and *Wyatt* v. *Blades* (*e*), which two last cases were *Nisi Prius* decisions, and *Lee* v. *Lopes* (*f*), and *Price* v. *Helyar* (*g*), *Carlisle* v. *Garland* (*h*), which was a special verdict, and *Dil-*

(*a*) 1 Sir W. Blac. 69.

(*b*) 3 Wils. 304; S. C. *nomine Hitchin* v. *Campbell*, 2 Sir. Wm. Blac. 827.

(*c*) 5 J. B. Moore, 313.

(*d*) Selw. Ni. Pri., 8th edit. p. 1431; cited in 4 Mau. & Selw. 260.

(*e*) 3 Camp. 396.

(*f*) 15 East, 230.

(*g*) 1 Moore & Payne, 541; S. C. 4 Bing. 597.

(*h*) 5 Moore & Payne, 102; S. C. 7 Bing. 298.

lon v. *Langley* (*a*), as constituting one continued series of decisions, establishing the liability of the sheriff. These will be found to embrace a very considerable period of time, and to have been established in succession by all the common law Courts in Westminster Hall; and the common practice, I believe, has been in uniform concurrence therewith. I cannot think, that, against this accumulation of authority, the single case of *Bayly* v. *Bunning*, as reported in Levinz, ought to prevail; and that, however strong particular notions may be as to what the law ought to be, we must be governed by what it has been during the whole time of living memory. I am of opinion, therefore, that the judgment of the Court below, as to Jewison, should be reversed.

Mr. Justice BOSANQUET.—The question in this case depends upon the effect which is to be given to a statutory provision by which the property of a bankrupt, which he had at the time of his bankruptcy, is subjected to the operation of a commission against him. The terms of the 6 Geo. 4, by which the bankrupt law is now regulated, do not materially differ from those of the statutes which immediately preceded it; and, being *in pari materiâ* with these, must receive a similar construction, there being no reason to suppose that any alteration regarding the point under consideration was intended to be made by the legislature. It is not to be disputed, with respect to persons in general, that, after an assignment by the commissioners, all the property of the bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been from the time of the act of bankruptcy, the property of the assignees; and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for a tortious conversion in an ac-

(*a*) 2 Barn. & Adolph. 131.

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tion of trover. This liability to answer in an action of tort to the assignees does not depend upon any actual or presumed knowledge on the part of the defendant of the existence of an act of bankruptcy. The act of bankruptcy subjects the property of a trader to the right of his assignees, in the event of a commission; and when the assignment has been executed, the title of the assignees is completed, by relation, from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardship to individuals who may have purchased or disposed of property with perfect honesty and good faith. But the necessity for adopting a retrospective measure for the prevention of fraud has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods sold by the sheriff under an execution against a trader, are liable to be sued in trover for the value of the goods by the assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the bankrupt law, by provisions introduced into the latter statutes, by which parties who act *bonâ fide*, and without notice of an act of bankruptcy, are protected, unless a commission shall have issued within a certain time. Such being the general effect of the bankrupt law, the point now to be considered is, whether any exception to it is to be allowed in favour of the sheriff, who sells under the process of the law. No words importing any express exception are to be found in any of the statutes; the exception, therefore, if established, must be established by implication. The mere absence of notice is not a sufficient ground on which an exception in favour of the sheriff can be founded; for, in cases where a change of property has taken place without fraud, the sheriff, if he seizes and sells the goods of the purchaser under an execution against the seller, will be liable in an action,

though he may neither know nor have reason to suspect the change. In the case of bankruptcy, the act of bankruptcy, whether notorious or secret, is a fact which, coupled with the existence of a debt to a certain amount, renders the property of a trader liable to the operation of a commission. The right of the trader to his own property is a defeasible right. Till the commission issues, the property remains in the trader; but he holds it, from the time of the act of bankruptcy, liable to be defeated by the proceedings under a commission, and subject to the rights, which, in the event of a commission, the assignees may acquire to it. In the mean time, this possibility of a right accruing to assignees under a commission, affords no legal answer to the sheriff for not executing the writ directed to him; but, if the sheriff has reason to apprehend a commission, he may ask for an indemnity; and in case a satisfactory one be not given, he may apply to the Court for time to return the writ, till it can be ascertained whether a commission is intended to be issued. Some risk indeed will be incurred by the sheriff; and, if he is necessarily to be protected from all risk, an exception in his favour must be implied by law. But it is to be recollected that the office of sheriff is in its nature an office of risk. It is not for us now to consider whether the policy of the law, which has made it so, is or is not founded on wise principles. But so the law has made it, and so it must be treated in Courts of justice. The sheriff is bound by statute to permit a defendant who is arrested to go at large upon bail; yet, if the bail, apparently or even actually responsible at the time, become insolvent before the return of the writ, the sheriff must render the defendant, or pay the debt. This is a hardship upon the sheriff, imposed by the operation of the statute of Henry the Sixth. No difficulty, however, is found in obtaining persons willing to incur this responsibility, the office being an office of profit as well as of risk. If, therefore, the liability of the

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sheriff in the present case were now to be considered for the first time, I think that his title to an exemption from the general operation of the bankrupt law, would be far from clear. To me, however, it appears, that the question ought not, at the present day, to be considered as open to discussion. The interpretation of the statute law, as well as of the common law, is to be sought for in the doctrines promulgated and acted upon in Courts of justice. It may be admitted, indeed, that the express provisions of a statute cannot be overturned by the authority of a Court; but, upon the propriety of admitting an implied exception, in the absence of express words, the authority of the Courts has the same weight as upon questions of common law; their decisions give the rule by which the profession is guided in advising parties upon their respective rights: and to question their correctness, after they have been recognised and acted upon for a long series of years, is not only to introduce uncertainty upon the point under immediate consideration, but to encourage resistance to established rules, by holding out to ingenious persons a prospect of overturning them, upon subtle and refined distinctions. If the judgment in *Cooper* v. *Chitty* be considered with reference to the facts of that case only, it will not amount to an authority upon the point now under discussion, since it appears that the sale by the sheriff took place, not only after the date of the commission, but after the assignment. But the authority of considered judgments is not to be confined to the point actually adjudged. The reasoning of Lord Mansfield, in delivering the judgment of the Court, appears to take a wider range than the particular facts of the case required. He begins by saying, that the bare defining the action of trover, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution, of the question in that particular case. In form, he says, it is a fiction; in sub-

stance, a remedy to recover the value of personal chattels converted by another to his own use; that it lies in many cases where the defendant has got the possession lawfully; that two things are necessary to be proved, property in the plaintiff, and a wrongful conversion by the defendant. After laying it down, that dispositions by process of law are upon the same footing with dispositions by the party, and that, to be vested, they must be completed before the act of bankruptcy, he says—"Therefore, as to the first point, it is most clear that the property was in the plaintiffs, as on and from the 4th of December, when the act of bankruptcy was committed. Secondly—The only question then is, whether the defendants are guilty of a wrongful conversion. That the conversion itself was wrongful is manifest. The sheriffs had no authority to sell the goods of the plaintiff, but of Johns only." Here the right to the property disposed of is made the test of the wrongful conversion. His Lordship then proceeds to consider whether the defendant was excusable, though the act of conversion was wrongful. As to which he says—"Though the statutes rescind contracts and executions not completed before the act of bankruptcy, they do not make men trespassers or criminal by relation." "But the injury complained of (that is, in the action of trover,) is the wrongful conversion." "The sheriff acts at his peril, and is answerable for any mistake." "None of the cases authorize the sheriff to sell the goods of a third person." Here the distinction between trespass and trover appears to be distinctly taken. The injury complained of in trespass is the unlawful force; in trover, the wrongful conversion of property. The mere act of force is excused if committed before an assignment in fact; but if a conversion takes place, the person to whom the law ascribes the property is entitled to a compensation for his loss, from the person, whoever he may be, that has converted his property. It had been determined, in the case

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of *Bayly* v. *Bunning* (*a*), that a sheriff, who had taken goods in execution after an act of bankruptcy, was not liable to the assignees in an action of trover. The dates, and the special finding of the jury, as they all appear upon the special verdict, have been already stated. It is very material to observe, that, in this case there was no sale; nothing was done with respect to the goods beyond the first taking possession under the writ by the officer, in whose hands they still remained when the action was brought; and the sole question referred to the Court by the jury was, whether this taking was lawful. Unless this taking amounted to a conversion, the defendant was entitled to a verdict; for, the demand and refusal stated in the special verdict, though evidence of a conversion, could not be taken to amount to an actual conversion—a point which had been settled long before the case in question, having been laid down as clear by Lord Coke, in the case of the Chancellor of Oxford (*b*). According to the report in Levinz, Mr. Justice Wyndham said, that, notwithstanding the suing of the writ, the goods are subject to the disposal of the commissioners: but he, Mr. Justice Twysden, and Lord Chief Justice Kelynge, all agreed, that the issue was found for the defendant; for, the taking by him was lawful, by virtue of the writ. Siderfin says the Court delivered their opinion that the goods were liable from the time of the teste of the *fieri facias;* and this shall be said to be *emanatio brevis*, although it was in fact at another time. And, as to the other point, they were clearly of opinion that the bailiff was not liable in trover; for that the sheriff (as the case is found) took the goods lawfully. According to Keble, Lord Chief Justice Kelynge said, the special conclusion being on the taking, the officer is not punishable. The case of *Bayly* v. *Bunning*, therefore, is

(*a*) 16 Car. 2, reported 1 Lev. 173; 1 Sid. 272; and 2 Keble, 32.
(*b*) 10 Rep. 56, 57.

not an authority for the sheriff where there has been an actual sale; and so Lord Mansfield appears clearly to have thought. And with respect even to the original taking, the case of *Bayly* v. *Bunning* is distinguishable from executions of a later date; for, though the writ of *fi. fa.* had been delivered to the sheriff after an act of bankruptcy, it was tested before; and, having been issued in a case which occurred before the statute 29 Car. 2, c. 3, it did then bind the goods from the teste; upon which point much reliance was placed. Accordingly, Lord Mansfield observes, that "In the case of *Bayly* v. *Bunning*, the goods were clearly bound by the teste;" and then adds, "The question referred by the special verdict was upon the *taking*, viz. whether the party was guilty in the *taking*, and the Court excuse the bailiff for his *innocent executing* of the writ." The act of taking seems to have been treated as an act of excusable trespass, either on account of the teste, or the character of the officer; and, independently of the taking, there was no conversion. It is remarkable, that Siderfin, after stating the argument for the bailiff, that he ought not to be found guilty, because he had only performed his duty, and had not converted the goods to his own use, adds—"*Quære*, for it was affirmed that the practice is, that the bailiff shall be found guilty, if the party was then a bankrupt." It is said in Lord Raymond's reports (*a*), to have been ruled by Lord Chief Justice Holt, at *Nisi Prius* (*b*), that if, after a bankruptcy, the sheriff, upon a writ of *fi. fa.* against A., seizes the goods, and *sells them*, and a commission of bankruptcy is granted, and the goods assigned by the commissioners, the assignee of the commission may maintain trover against the vendee of the goods, but no action will lie against the sheriff, because he obeyed the writ." The latter part of this proposition is the very point now contended for, to which it appears,

(*a*) Lord Raym. 724. (*b*) 10 Will. 3.

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from his remarks on Lord Raymond's notes, that Lord Mansfield did not assent. He says, "The notes were taken when Lord Raymond was young, as short notes for his own use, and are too incorrect and inaccurate to be relied on as authorities; that it might not be at all material to attend to the distinction between trespass and trover; that the passage in question was a loose note of what was said obiter, and manifestly refers to the case of *Bayly* v. *Bunning;* but is no authority in the present case." It must be admitted, however, that Lord Mansfield, in several parts of his judgment, notices and avails himself of the sale in *Cooper* v. *Chitty* being subsequent to the commission and assignment. Thus, in commenting upon *Cole* v. *Davies,* he says: "Besides, the case there put is of a sale by the sheriff before the commission, and the conversion might be as excusable as the taking, because he obeyed the writ; whereas, here, the goods were not sold till after both commission and assignment." Again, "The taking (in *Cooper* v. *Chitty*) was innocent, and, in that sense, lawful; but, as a ground to support a conversion by a sale after a commission publicly taken out, and an actual assignment made, it was not lawful." And at the conclusion—"The gist of this action is the wrongful conversion by the sale and false return long *after* the commission and assignment." A question might, therefore, fairly be raised, whether the proposition ascribed to Lord Holt was intended to be denied by Lord Mansfield, or only to be distinguished from the case in judgment. It is scarcely possible that such a point should be long suffered to remain in doubt, since it must have been of frequent occurrence; and, if the general reasoning of Lord Mansfield, and his particular observations respecting Lord Raymond's note, have, from the year 1756, been treated, in practice and in judgment, as contradictory to the point therein stated, the point ought to be considered as over-ruled. Two passages, apparently inconsistent with

each other, have been cited on the authority of Sir W. Blackstone. In his report of *Cooper* v. *Chitty*, he states Lord Mansfield to have said: "But, had the sale been immediately after the seizure, still the sheriff would have been liable." And in his report of *Timbrel* v. *Mills*, that "the whole Court declared that it was allowed in that case (*Cooper* v. *Chitty*), that, if the sheriff levies the money and pays it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will at all events be safe." It is not likely that both these passages should have been uttered by Lord Mansfield upon the same occasion; and, as no notice is taken of either of them in the report of Sir James Burrow, or in that of Lord Kenyon, little reliance can be placed upon them. No question appears to have been raised respecting the effect of the judgment in *Cooper* v. *Chitty*, till the year 1807, in the case of *Potter* v. *Starkie;* but, in the meantime we find the principle supposed to be established, stated in practical books, and assumed in Courts of justice. In the edition of Cook's Bankrupt Law published many years before the case of *Potter* v. *Starkie*, it is said—"The sheriff, who executes a *fi. fa.* upon the bankrupt's goods, after an act of bankruptcy committed, and before the issuing of a commission, is not a trespasser; but the assignees may maintain trover against him." In Gwillim's edition of Bacon's Abridgment, published in 1798 (*a*), it is said: "It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had taken the goods of a bankrupt in execution after an act of bankruptcy and before the issuing a commission. But it is now settled that the assignees may in such case bring trover against him, though the relation shall not operate to make him a trespasser." The distinction with respect to the liability of the sheriff in

(*a*) Title "Bankrupt."

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trover, though exempt from an action of trespass, had been recognised in 1786, in *Smith* v. *Milles* (*a*), as established by *Cooper* v. *Chitty*. In *Hitchin* v. *Campbell* (*b*), only sixteen years after *Cooper* v. *Chitty*, which was an action of *indebitatus assumpsit* against an execution-creditor for the amount of a debt levied after the act of bankruptcy, but before the commission, Lord Chief Justice De Grey, in delivering the opinion of the Judges (of whom Sir W. Blackstone, who reports the case, was one), says, "that the legal effect of an act of bankruptcy committed by a trader, is, to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission is afterwards issued. This relation takes place in every instance but those excepted by the statutes 1 Jac. 1, 21 Jac. 1, and 19 Geo. 2. Executions are not among those excepted cases, but are expressly declared void by the statute 21 Jac. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no *trespasser* by taking the goods in execution after the act of bankruptcy and before the commission issued — so ruled in *Lechmere* v. *Thorowgood* (*c*), and in *Cooper* v. *Chitty* (*d*). But, by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." A former action had been brought in trover against the sheriff and the defendant, in which there was a verdict and judgment for the defendant; as to which action the Lord Chief Justice observed —"As there was clearly a conversion before the action of trover, the only question could be on the property;" thereby intimating, that, if the goods belonged to the bankrupt, there could be no defence. And, according to

(*a*) 1 Term Rep. 475.

(*b*) 2 Sir W. Blac. 829, Trinity Term, 12 Geo. 3.

(*c*) 1 Comb. 123; 3 Mod. 236; 1 Show. 12.

(*d*) 1 Burr. 20.

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the report of the same case in Wilson (*a*), the Court say, "that the action brought in trover against the sheriff of Surrey and the defendant, to recover the value taken in execution, well lay." In the year 1792, Mr. Justice Grose, in the case of *Farr* v. *Newman* (*b*), after adverting to the difficulty on the part of the sheriff of distinguishing between the goods of an executor and the goods of a testator, says: "If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases where a sheriff is considered as a *tort-feasor by relation;* cases of bankruptcy?" In the case of *Menham* v. *Edmonson* (*c*), the act of bankruptcy took place in December, 1796, the execution on the 30th of March, 1797, and the commission issued in the June following. The execution-creditor having accompanied the sheriff's officer at the time of the execution, he was sued by the assignee in trover; and, it being objected that the action should have been brought against the sheriff, in whose hands the money remained (it was not contended that the action might not have been maintained against him), Lord Chief Justice Eyre, after stating that he had some doubt at first whether the action should not have been brought for the money, as the execution had been regularly made under the authority of the law, and the goods regularly sold, observed—"There is a fact, however, in this case, which decides the point, viz. that the defendant was in company with the sheriff's officer at the time of the execution. By the case cited, *Rush* v. *Baker* (*d*), it appears that trover may be maintained against the party himself, if he give bond to the sheriff, because that is equal to intermeddling; actual intermeddling, therefore, must be equal to giving a bond." Here, the liability of the sheriff himself seems to have been assumed; and the

(*a*) 3 Wilson, 308.
(*b*) 4 Term Rep. 633.
(*c*) 1 Bos. & Pull. 369.
(*d*) 2 Str. 996.

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participation of the defendant in his act is stated as the ground of his liability. In the year 1807, the point now in question was distinctly made before Mr. Baron Wood, in *Potter* v. *Starkie*; and that Judge, whose practical experience as well as learning are well known, held the sheriff liable; in which he was confirmed by the Court of Exchequer. Eight years after this, the case of *Wyatt* v. *Blades* (*a*) occurred before Lord Ellenborough, in which, the act of bankruptcy having taken place on the 8th of December, the goods were seized and carried to a broker on the 8th of February, and the commission issued on the 12th of the same month; and Lord Ellenborough held, in trover against the sheriff, that the removal was a sufficient conversion to support the action, though the goods were never sold, but remained at the broker's in consequence of a notice not to sell: and, though no demand of the goods had been made, no objection was made to the liability of the sheriff to answer for the conversion. In eight years more, in the year 1821, the point was again raised, in *Lazarus* v. *Waithman* (*b*), in the time of Lord Chief Justice Dallas, when the Court of Common Pleas, after an argument in which *Bayly* v. *Bunning* and other old cases were cited, decided against the sheriff—Mr. Justice Burrough saying that the point was settled long before he knew Westminster-Hall. Again, in 1828, in *Price* v. *Helyar* (*c*), in the time of Lord Chief Justice Best, the same Court came to a similar determination. And the judgment of that Court in *Carlisle* v. *Garland* (*d*), in the year 1831, in the time of the present Lord Chief Justice, was conformable to the prior decisions. Finally, in the same year, 1831, the Court of King's Bench, in *Dillon* v. *Langley* (*e*), also decided in the same manner against the sheriff. Upon that

(*a*) 3 Camp. 396.
(*b*) 5 J. B. Moore, 313.
(*c*) 1 Moore & Payne, 541; S.C. 4 Bing. 597.
(*d*) 5 Moore & Payne, 102; S. C. 7 Bing. 298.
(*e*) 2 Barn. & Adol. 131.

occasion, the noble and learned Lord whose loss we have so recently had to deplore (Lord Tenterden), expressed the opinion of the Court in the terms which I desire to adopt, and with which I shall now conclude. "He (the sheriff) must obey the writ, but he is also required to know whose goods he takes. I think, in this case, we ought to say that we consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff." I am therefore of opinion that the judgment of the Court of Exchequer ought to be reversed.

Mr. Justice GASELEE.—Upon the best consideration I have been able to give to this case, I am of opinion that the judgment of the Court of Exchequer ought to be affirmed; and, although I am sorry to have the misfortune to differ from those of my learned brethren who have preceded me, and also from those who are to succeed me upon this occasion, it is a matter of great consolation to me, that I am supported by the unanimous opinion of the Court of Exchequer. The reasons upon which that judgment is founded are so fully, and to me so satisfactorily, stated by the Lord Chief Baron in the reports of the case (*a*), that I should consider myself guilty of an unnecessary waste of time, were I to repeat them from the reports; and I should run a considerable risk of weakening their impression, were I to attempt to state them in any other terms. There is certainly great weight in the argument, that the decisions in *Cooper* v. *Chitty*, and many subsequent cases, are contradictory to that of the Court of Exchequer; and if they had corresponded with the older cases, so that there had been a constant course of decisions in the same way, I should have very much hesitated before I should have ventured to break in upon them; and it is to that circumstance that I attribute

(*a*) 2 Cromp. & Jervis, 19; S. C. 1 Tyr. 17.

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my having concurred in the judgment given by the Court of Common Pleas in the case of *Price* v. *Helyar*, having always considered, that, if the case were a new one, the sheriff was undoubtedly entitled to protection. Independently, however, of the circumstance, that, in the case of *Cooper* v. *Chitty*, and many of the subsequent ones, the acts of the sheriff, after he had notice of the bankruptcy, were sufficient to support the decision of those cases, it appears to me that the earlier cases are authorities in favour of the sheriff; and, therefore, that, in affirming the judgment of the Court of Exchequer on this occasion, we should not be overturning the constant course of the authorities upon the subject, but restoring the law as it was laid down and acted upon in the reign of Charles the Second, and from thence downwards to the time of the decision in the case of *Cooper* v. *Chitty*. Upon considering the several reports of the case of *Bayly* v. *Bunning*, it is not quite clear that the allegation in the judgment of the Court of Exchequer — that, in deciding the case of *Bayly* v. *Bunning*, the Court, by disallowing the objection that the goods were to be considered as bound by the teste of the writ of execution, which was before the act of bankruptcy, allowed the other objection, viz. that the taking was lawful in respect of the character of the person by whom it was made—is quite accurate; for, although the latter was clearly one of the grounds of the decision, it is not so clear that it was the only one. The report in Levinz concludes thus: "And afterwards, in Easter Term, 18 Car. 2, judgment was given for the defendant; he being an officer obliged to execute the writ, who could not be aware of any acts of bankruptcy, or know that any of them would be acted upon." And the report in Siderfin states that the Court, as to the other point, viz. the character of the sheriff, were clear that the bailiff is not guilty of trover; for that the sheriff took the goods lawfully.

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During the argument of this case in the Court of error, a doubt was thrown out whether the case of *Bayly* v. *Banning* was an action of trover; and it was suggested that it might have been an action of trespass, and so reconcile all the cases. The original roll has, therefore, been inspected, and it thereby clearly appears that the form of action was trover. It is unnecessary for me to trouble the Court with any further observations.

Mr. Justice LITTLEDALE.—It is admitted on all hands, that, as far as relates to the judgment-creditor, if he interferes in the sale or receives the produce after the sale, and also the vendee of the sheriff or other officer, the goods of the bankrupt are upon the assignment to the assignees vested in them by relation to the act of bankruptcy, so as to avoid all mesne acts and dispositions; and that both upon the words of the various acts of parliament and the uniform construction that has been put upon those acts, and the policy of the bankrupt laws. And, therefore, I do not think it necessary to advert to any authorities as to the ground or effect of relations either at common law or by any acts of parliament. The words of the act of parliament relating to bankruptcy are general, and make no exceptions as to the persons to be bound; only, indeed, that, as the king is not named in them, they do not affect the crown till there is an actual assignment of the property. But it is contended, on the behalf of the defendant, that he is to be exempted from liability for seizing and selling, if he has no notice of an act of bankruptcy; and he contends this upon two grounds—first, that the older statutes of 33 & 34 Hen. 8, c. 4, 13 Eliz. c. 7, 1 Jac. 1, c. 15, 19 Jac. 1, c. 19, and 5 Geo. 2, c. 30, do not extend to the sheriff at all—and secondly, that the last statute of 6 Geo. 4, c. 16, does not increase the liability of the sheriff.

The statute of Hen. 8 says, the sale by the commission-

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ers shall be as good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty. The 13 Eliz. c. 7, s. 2, says, the sale by the commissioners shall be good and effectual (after an enumeration of various descriptions of persons) "against all other persons claiming by, from, or under the bankrupt, by any act had, made, or done after he shall become a bankrupt." The other acts of the 1 Jac. 1, 19 Jac. 1, and 5 Geo. 2, as to the sale or assignment by the commissioners, all refer to the 13 Eliz. c. 7; and no fresh powers are given to the commissioners, except that the 26th section of the 5 Geo. 2 directs the commissioners to assign to assignees for the general benefit of creditors who prove their debts. But I think that the words of the statute of Elizabeth are sufficient to bind the sheriff; for, though he does not claim, as to any beneficial interest, from the bankrupt, yet he claims to sell for the purpose of paying over the proceeds to the creditors of the bankrupt; and the person to whom he sells certainly claims under the bankrupt: and it would be somewhat extraordinary if the sheriff, who sells under such circumstances, was to be excepted out of the operation of the statute.

I may observe, that I am not aware that this point has ever been raised before; which, if there had been any ground for it, would surely have been done, considering the great variety of cases in which this subject has been agitated for the last seventy years. The statute of 6 Geo. 4, c. 16, is differently expressed from the former acts. In the 12th section, it says, the commissioners are to assign in manner after directed; and then the manner is directed in the 63rd section, which contains no such words as are contended to be a limitation of the persons bound. But I do not consider whether this enlarges the power of the commissioners or not, because I think the former acts extend to sheriffs and other similar public

officers. But it is said the law will make an implied exception in favour of the sheriff or other person having the execution of process, because he is bound to obey the king's writ; and it would be very hard to make him liable to an action when he acts according to the best of his judgment, and has no means of ascertaining whether the debtor has or has not committed an act of bankruptcy. With regard to his being a public officer, and as such bound to obey the king's writ, there is no doubt but he is; and in the execution of that duty he ought to be protected. But the question is, does he act in obedience to the king's writ? That commands him to take the goods of A.; but how can they be said to be the goods of A., when A. himself has lost his power of conferring any property in them, and when the judgment-creditor has no right to have them as the goods of A., and when the person to whom the sheriff will sell has no such right? The result therefore is, that, instead of seizing the goods of A., he seizes the goods which, by relation, have become the goods of the assignees. But it may be said they *are* the goods of A., that he has acquired them, that he is in possession, treats them as his own, and no other person has yet acquired a right to them. But, by the act of bankruptcy, there is a sort of stamp or mark fixed upon them, which, though invisible at first, afterwards is brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt; which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operates in the same way as if the whole had been known at first. He takes upon himself to sell goods which the judgment-creditor has no right to have sold, and which the person who buys from the sheriff has no right to buy. How can this be acting in obedience to the king's writ? As to the hardship upon the sheriff—the general policy of the bankrupt laws makes many things apparently hard. It is very

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hard, that, if a man who owes a trader money pays it to him *bonâ fide* in the regular course of business, without any suspicion of an act of bankruptcy; or, if a bankrupt owes money which he pays to a creditor in the ordinary course of business, he having no suspicion that an act of bankruptcy has been committed; or, if a trader sells his estate after having committed a secret act of bankruptcy —that all these transactions should be rendered invalid by the general operation of the bankrupt laws. Yet it is so; and it is only by several particular acts of parliament applicable to these various cases, that the various hardships I have enumerated are corrected or modified. It is a hardship on a sheriff if he seizes goods of which the debtor is in the possession and apparent ownership, and it should turn out that the possession and apparent ownership were not fraudulent, that the sheriff should be liable; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership. I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed, that many persons fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere, they will do so. If cases of hardship be brought before the Court, they will frequently interfere so as to relieve the sheriff, if the law will permit it; and a late act of parliament, often called the interpleader act, in some degree acts as a relief to the sheriff: but that has nothing to do with the general liability of the sheriff. But then the defendant says, that, by the constructions which have been put upon the statutes by the general administration of the bankrupt law, public officers who have to execute process are protected in cases like the present; and that, though for a number of years back there are cases, and the practice while these cases have been in force has been against sheriffs, yet these recent cases and practice are not according to law; and that the earlier cases

are contrary; and that they, being the first that occurred after the bankrupt law was introduced, are to be regarded as the real existing law, not to be overturned by late decisions: and more particularly, as the defendant says, that the whole of these modern cases and modern practice have been founded on a misapprehension of the case of *Cooper* v. *Chitty* (*a*); and that, in all the later cases, the former decisions have not been brought before the Court. The earliest case urged on the behalf of the defendant is *Bayly* v. *Bunning* (*b*); and the Judges there say, that the sheriff's taking was lawful by virtue of the writ. But, in Siderfin, the reporter makes a query—"For it is affirmed that the practice is, that the sheriff shall be found guilty, if the party was then a bankrupt." The special verdict in *Bayly* v. *Bunning* has been examined, and it appears that the sheriff had caused to be made the debt, of the goods, chattels, and monies of the bankrupt; but that they remained in his hands, and he had not sold or delivered them to the judgment-creditor; and then it states a demand and refusal; and it concludes with saying that they are ignorant whether the *taking* was lawful. This special verdict is quite imperfect: there is no conversion found, and the question by the jury is, whether the *taking* was lawful: and that may account for the language of the Judges, that the taking was lawful, which may have been meant to apply to the original taking only, and not to say whether, if the goods had been sold, the sheriff would be liable: and, therefore, on such an imperfect case, and the very slight way in which it is mentioned in the two reports, the decision amounts to very little, especially as one reporter states the practice to be contrary. This case, however, as far as it goes, is confirmed by what the Court say in *Philips* v. *Thompson* (*c*).

(*a*) 1 Burr. 20; 1 Sir W. Blac. 69; 1 Ken. 395.

(*b*) 1 Lev. 173; 1 Sid. 271.

(*c*) 3 Lev. 191.

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Turner v. *Felgate* (*a*) was mentioned in *Bayly* v. *Bunning*, and it has been considered as applicable to the present case. That was an action of trespass against the creditor, who had obtained judgment and levied under a *fieri facias*, and the judgment was afterwards set aside by rule of Court. And it was there said, that the sheriff was not liable, because he acted in obedience to the king's writ; and that there is a difference between the party and the sheriff in that respect. There is not the least doubt about that; the sheriff is protected by the writ, and he need only plead that by way of justification to an action of trespass. But the party must plead the judgment. The sheriff is bound to obey the writ: but the party must shew that he had authority to sue out the writ, and that authority is the judgment. If the party was not bound to shew the judgment, it would be in the power of any man who had obtained no judgment to sue out any sort of writ of execution for any amount that he thought proper. But that does not apply to the present case; here the writ directs the sheriff to take the goods of A.; and if he does take the goods of A., it is immaterial to him whether there was any judgment against A. or not. But the complaint is, that he does not obey the king's writ, and that, being directed to take the goods of A., he takes goods which, though in the possession of A., yet, by operation of the bankrupt law, ultimately turn out not to be the goods of A. The case of *Lechmere* v. *Thorowgood* (*b*) is also cited in favour of the defendants. That was an action of trespass against the sheriff. One of the points in dispute was, whether the crown under an extent, or the party under a *fi. fa.*, was entitled to the goods. But the Court said, the sheriff was not liable in this action: and, there is no doubt, but that, according to the modern cases, he is not liable in tres-

(*a*) 1 Lev. 95; 2 Sid. 125.
(*b*) Comb. 123; 3 Mod. 236; 1 Shower, 12.

pass; for, in *Smith* v. *Milles* (*a*), it was held that an action of trespass will not lie against the sheriff who seizes goods after an act of bankruptcy and before the issuing of a commission, even though he afterwards sells them. But, at the same time, I must observe, that, in the report of the case of *Lechmere* v. *Thorowgood* in 3 Modern, there is nothing said about the liability of the sheriff. Afterwards, an action of trover was brought against Toplady, the party, and Thorowgood and another (*b*), for taking the goods, and they pleaded the judgment in the former action; and it was held to be a bar. But that was decided only on the technical ground of law, that, after a judgment for the defendants in trespass, the plaintiffs could not recover in an action of trover for a conversion of the same goods. But there is not a syllable said in the latter case as to the liability of the sheriff; and I think no argument can be applied from any reasoning upon technicalities and the form of action, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present. *Cole* v. *Davies* (*c*) is also cited for the defendants. Lord Chief Justice Holt there held that the sheriff was not liable to an action of trover under circumstances like the present. That case, as far as it goes, is in point for the defendants, but it is only a *Nisi Prius* decision. As to the other cases, of *Bayly* v. *Bunning*, and *Lechmere* v. *Thorowgood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bayly* v. *Bunning*, I think they only amount to a declaration of the opinions of the Judges there, that, generally speaking, the sheriff was not liable, but by no means to a judgment upon a case like the present, distinctly brought and argued before them; and that, therefore, the Courts in late times are not so far bound by those cases but that they may take another

(*a*) 1 Term Rep. 475.

(*b*) *Lechmere* v. *Toplady*, 1 Show. 146; 2 Ventris, 169.

(*c*) 1 Ld. Raym. 724.

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view of the subject without being considered as unwarrantably overturning former decisions. The case of *Cooper* v. *Chitty* is the leading case on the point in more modern times. I admit, that the facts of that case are not the same as here (for, there the sale was after notice of the act of bankruptcy, and after the commission and assignment); and that the decision would not of itself be sufficient to authorize the Court to give judgment for the plaintiff. That case has been followed by a variety of other cases, in some of which at least the facts were the same as the present. I do not think it at all necessary to go through these cases, and comment upon them, and upon the language used by particular Judges, as that has been so fully done already. The result of these cases fully satisfies my mind, that, in the present case, the bailiff is liable; and I may say in addition, that I have known a great many cases tried at *Nisi Prius*, in which the point has never been doubted. And I would also add in conclusion, that, if the cases of *Bayly* v. *Bunning* and *Lechmere* v. *Thorowgood* had been fully brought before the Court upon a case like the present, and the judgment given according to the opinion there expressed by the Judges, yet, if I had found, that, for a series of years, there had been so many decisions and constant practice the other way, then, inasmuch as the later authorities are according to what would be my opinion if the question was now for the first time to come under consideration, I should say that the Court ought to act upon the late authorities, though by that means the former decisions should be overturned. I have not given any opinion as to the effect of the respective indemnities to Jewison and to Ingham, as I am of opinion that they are both liable to this action, independently of any question of indemnity.

Upon the whole of the case, I am of opinion that the judgment of the Court of Exchequer ought to be reversed.

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Mr. Justice PARK.—This case has been so fully discussed by my learned brethren who have preceded me, that I am much tempted merely to express my concurrence with the majority. The only reason why I prefer the contrary course is, that I may not be supposed to have taken no pains to instruct myself in a matter where the Court of Exchequer has delivered an unanimous judgment, supported, as that judgment is, by my learned brother sitting next me (Mr. Justice Gaselee); and which judgment the majority of the Judges now present think ought to be reversed.

The real point in this case is, whether a sheriff or bailiff of a liberty who seizes the goods of a man under a writ of *fieri facias*, a secret act of bankruptcy having been previously committed, of which the sheriff had no notice, is liable to an action of *trover*, at the suit of the assignees of such person under a commission of bankruptcy subsequently issued, founded upon the previous act of bankruptcy. I am of opinion that he is. It may certainly be hard upon a sheriff or bailiff that he should be held liable in a case like the present, where no misconduct can be imputed to him or to his officers; but it appears to me, that if, on account of such hardship, we were to affirm this judgment of the Court of Exchequer, we should break in upon an established rule of law—established confessedly for above seventy years; admitted as a clear rule in all the text books of writers upon bankrupt law; acted upon by all practisers, in their advice to clients; and confirmed by some of the ablest men that have ever adorned the judicial seat, from Lord Mansfield down to the present day—from the year 1756. The question really is, whether these goods, when the bailiff seized them, were the goods of the bankrupt, or the goods of the assignees, by relation to the act of bankruptcy. That the act of bankruptcy vests the goods in the assignees seems not to be disputed: then, certainly, the process having commanded that the goods of A. should be taken, the sheriff must, at his peril, answer if he take

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goods which have become the property of B., by being sued in an action of trover. Mistake as to the right of property at the time of the seizure, both in the plaintiff herself, as to her rights, and in the sheriff, as was truly stated by my brother Bayley in the case I am about to quote, will not excuse the sheriff. And indeed that was a very hard case. I mean the case of *Glasspoole* v. *Young* (*a*), where a writ of execution issued against a man named Meering, the supposed husband of the plaintiff, who really believed herself to be his *lawful* wife at the time of the seizure of the goods, which had been her property; but after this, the woman, discovering that a former wife was living, and the marriage with her consequently void, recovered the value of the goods against the sheriff in an action of trover, by the unanimous judgment of Lord Tenterden, and my brothers Bayley, Littledale, and James Parke. The rule of law, then, is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issues; and if they have ceased, without fraud, to be the goods of that party, the sheriff is liable if he seizes them, though not cognizant of the change of property. The hardship, then, can be no argument, if the law be clear; for, there are many cases in which the law has thrown a similar liability upon the sheriff, not regarding the hardship; and I am not aware of any exception in any bankrupt act in favour of the sheriff. The Court must, as Lord Ellenborough said, in the case of *Stephens* v. *Elwall* (*b*), be governed by the principles of law, and not by the hardship of any particular case; "for, what can be more hard," says his Lordship, "than the common case of trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole da-

(*a*) 9 Barn. & Cress. 696. (*b*) 4 Mau. & Selw. 259.

mage; and his person also shall be liable for it." The sheriff is in a much better situation; for, though he must often act at his peril, and sustains losses, yet he has considerable fees in poundage, &c., to remunerate him. It is admitted—indeed it was impossible to deny it—that the point has been expressly decided over and over again; but it is desired that all those decisions shall be overturned, because they all depend, it is said, upon the case of *Cooper* v. *Chitty*, and none of the later cases refer to the cases before *Cooper* v. *Chitty*, which are at variance with that decision: for, those who wish to overturn them allege, that, if the Courts had looked at those prior decisions, they never would have upheld Lord Mansfield's doctrine, and that of his brethren. This seems to me to be a most disingenuous argument, and not complimentary to the Judges who (numerous and powerful in knowledge and talent as many of them were), have decided those later cases. It is true, that, in the arguments of some of them, the older cases of *Bayly* v. *Bunning*, *Lechmere* v. *Thorowgood*, and others, have not been mentioned. But are we thence to infer that those learned Judges were unacquainted with, or did not weigh, those decisions? The fact is directly otherwise, and the fair and legitimate inference is the reverse. The later Judges, it is said, have followed *Cooper* v. *Chitty*. Be it so; then they must have read it; and they could not do so without seeing the cases which I have alluded to reasoned and commented upon, both at the bar and upon the bench: and therefore the fair and legitimate inference is, that the Judges were of opinion, that, if *Cooper* v. *Chitty* did overturn the former decisions, it was more consonant to reason, public convenience, and sound policy, in holding the sheriff liable even in case of mistake and ignorance, rather than to suppose that the Judges shut their eyes, and remained wilfully ignorant of the prior cases. Besides, it is a mistake in the judgment of the Court of Exchequer, when

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they allege that none of the cases later than *Cooper* v. *Chitty* refer to *Bayly* v. *Bunning;* for, the contrary is the fact. I have considered the cases alluded to; and, although I do not highly approve of very long and elaborate judgments, yet I must say, that, in all the reports of the different stages of the case of *Lechmere* v. *Thorowgood* and *Lechmere* v. *Toplady*, it is most difficult to get at the real history of that case; but, taking them all together, one thing seems clear, viz. that the sheriff was held not to be a trespasser in such a case as this; and no Judge, in *Cooper* v. *Chitty*, nor in any case since, has so considered him. It was also held, in *Lechmere* v. *Toplady*, where trover was afterwards brought, that it would not *then* lie, not that it would not lie, generally speaking; but that the plea of the judgment in the action of trespass against the sheriff was a good bar by way of estoppel. Whether the Court was right or wrong in this latter opinion, I do not stop to inquire; if wrong, it weakens the authority of the case altogether; if right, it does not militate against the position that *trover* generally will lie against the sheriff, though *trespass* will not. Comberbach (*a*) makes Lord Chief Justice Holt say that the property of the goods is vested by the delivery of the writ of *fieri facias*, even against the king's extent. This, Lord Mansfield truly says, he could not have said, for no *inception* of an execution can bar the crown. Lord Holt himself, in another case, says the direct contrary to what Comberbach here reports of him; for, in *Smallcombe* v. *Cross* (*b*), his Lordship says, that "the property of the goods is not absolutely bound by the delivery of the writ to the sheriff." And this question is now happily set to rest by the decision of the House of Lords last Session in *Giles* v. *Grover* (*c*). Besides, it is difficult to understand when and by whom this case of *Lechmere* v. *Thorowgood* was decided. In 3 Modern, it

(*a*) Comb. 123. (*b*) 1 Ld. Raym. 251. (*c*) *Ante*, Vol. 2, p. 197.

is stated to have been decided in Trinity Term, 4 James 2, at which time Sir John Holt was not Chief Justice; for, it is clear matter of history that he was appointed upon the revolution, in the room of Sir Robert Wright, who continued all the Michaelmas Term following the landing of King William to be Chief Justice; and no Hilary Term was kept in consequence of the revolution. Comberbach makes the decision take place in Trinity, 1 William 3, twelve months after the date of the former; and Shower states the decision to have taken place in Easter Term, 1 William 3. The case of *Lechmere* v. *Toplady* was in the Common Pleas, Hilary Term, 2 William & Mary. My only object in making these observations is, to shew the extreme inaccuracy and inattention of those persons, who, by this inaccuracy in dates, may be presumed to have taken their accounts of what passed from others, but not to have been themselves present: for, even the publisher of the 3rd Modern says, in his preface, that he must confess that some of the late reports (of course not meaning his own) are collected with very little judgment. *Bayly* v. *Bunning* was undoubtedly an action of trover; but, for the reasons so ably given by my brother Bosanquet (and which therefore I shall not repeat), it is clear, that, even giving full credit to the decision, it does not at all govern this case. But, even if it were more applicable to this case, I cannot feel that respect for such unsatisfactory accounts of that decision which would induce me to agree to overturn the uniform and consistent train of judgments of seventy-six years and more, by some of the ablest Judges that Westminster Hall has seen. The oldest man now living remembers no other rule upon this point than that which it is supposed is established in *Cooper* v. *Chitty*; and, admitting, for argument only, that that was a novel decision, yet no inconvenience has resulted from it; the Judges have been followers of it, counsel and attornies have advised upon the strength of it, and merchants have, as assignees,

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known and abided by the rule: and it is, as we well know, frequently immaterial how points of law are determined, provided they are known and uniform; and certainly this point of law has been known and uniform for the long period I have mentioned. I was, therefore, surprised to observe, in one of the arguments of this case in the Court below, a statement that there had been some recent decisions on this point. Who were the Judges who decided *Cooper* v. *Chitty*? Lord Mansfield, who is not, I believe, remembered by any one now present, myself excepted; but he was a Judge, who, in the expressive language of one who knew him well, and who could duly appreciate his learning and ability, so enlarged and commented upon cases, and was so powerful in argument, that his hearers were sometimes lost in admiration at the strength and extent of the human understanding. His colleagues, when *Cooper* v. *Chitty* was decided, were no other than Sir John Eardley Wilmot (afterwards Chief Justice of the Common Pleas) the very learned Mr. Justice Foster, and Mr. Justice Dennison. Was it a hurried decision? It was argued in two different terms, by four of the most eminent advocates of that day; after which the Court took time to deliberate; and then Lord Mansfield delivered a clear, lucid, and argumentative judgment of himself and his three most learned brethren, and commented upon the cases of *Bayly* v. *Bunning* and *Lechmere* v. *Thorowgood* in a way which shews at least that they had by no means been overlooked by the Court. The case of *Cooper* v. *Chitty* is best reported by Lord Kenyon (*a*); although there is no material difference between Kenyon, Blackstone, and Burrow; and whoever reads with attention Lord Kenyon's note, though his Lordship was then a very young man, will discover all the accuracy and acuteness of that great mind so well remembered by us who saw him (as many of us saw

(*a*) 1 Lord Kenyon's notes, 395.

him) in the full splendour of it; and, when reading this luminous judgment of Lord Mansfield's, as reported by his eminent successor, I cannot but lament, that, in the course of some of the arguments in the case now under consideration, Lord Mansfield should be charged with making "a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in six lines." I am sorry to say that the judgments of modern days cannot claim a superiority in conciseness and beauty above those of Lord Mansfield. Were I, after the discussion this case has undergone, and after the luminous argument of my brothers who have preceded me, to travel through and comment upon all the cases since *Cooper* v. *Chitty*, which have been uniform, I should indeed be justly chargeable with making an useless display of legal knowledge. I shall merely mention them, and the host of learned persons who have affirmed the doctrine. *Smith* v. *Milles* (*a*) was an action of trespass; and Mr. Justice Ashhurst and Mr. Justice Buller, after time taken to consider, held that it would not lie; but expressly took the distinction between trover and trespass; and a long passage of Lord Mansfield's judgment in *Cooper* v. *Chitty* is read by Mr. Justice Ashhurst, and adopted by the Court. Mr. Justice Ashhurst was not an eloquent man, but he was always reckoned a learned Judge; and of the high legal character of Mr. Justice Buller all the profession formed a very just estimate. In *Potter* v. *Starkie* (*b*), Mr. Baron Wood first, and the whole Court of Exchequer, held that the sheriff was liable in trover, though he seized, sold, and actually paid over the money *before a commission issued, and before any notice* —saying that this necessarily followed from *Cooper* v. *Chitty*; for, it was an unlawful interference with another's goods. In *Stephens* v. *Elwall* (*c*), it was held that a ser-

(*a*) 1 Term Rep. 475. (*b*) 4 Mau. & Selw. 260. (*c*) Id. 259.

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vant may be charged in trover, though the act of conversion be done for the benefit of the master; and Lord Ellenborough observed that the Court must be governed by the principles of law, and not by the hardship of any particular case. *Wyatt* v. *Blades* (*a*) is supposed (in the judgment we are now considering) not to shew sufficiently what the opinion of Lord Ellenborough was, nor whether the point we are now considering was at all raised. The facts of that case, however, were exactly similar to those now before us; and it seems to me impossible that Lord Ellenborough (though the counsel might not have stated the case with much precision) could have decided as he did, if he had not had the supposed point of *Cooper* v. *Chitty* in his view. The case of *Lazarus* v. *Waithman* (*b*) was decided by the Court of Common Pleas during the Chief Justiceship of Sir Robert Dallas, in the same way as *Cooper* v. *Chitty* was. I speak not of any opinion of mine in that case; but I can speak of two of the Court, happily still alive, though no longer of our body—two better lawyers could not be found—I mean my brothers Burrough and Richardson. The former states the point to have been settled long before he knew Westminster-Hall; the latter (and no man had more practical experience) says that the law, as to a question of this nature, had been long since settled, and had frequently occurred of late years at *Nisi Prius*. There must, therefore, have been an accidental mis-statement in the judgment below, when it is supposed that *Lazarus* v. *Waithman* was decided altogether upon *Cooper* v. *Chitty*, and that none of the earlier cases were mentioned. Those who know, as I of course did, the infinite pains Lord Chief Justice Dallas took to inform himself, by diligent research, and to procure information from others, of every case and decision that at all bore upon matters before him, will not readily

(*a*) 3 Camp. 396. (*b*) 5 J. B. Moore, 313.

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believe that he was not aware of the cases of *Bayly* v. *Benning* and *Philips* v. *Thompson;* but it happens that the very cases supposed to have been overlooked by the Court in *Lazarus* v. *Waithman,* were cited and relied upon by the learned counsel for the sheriff in that case: and in *Price* v. *Helyar* (*a*), which I only quote as an authority of three Judges of the Court, because my learned brother who sits next me thinks there was some mistake as to its having been the unanimous opinion of the four Judges, we have to add the weight and authority of that very eminent and acute Judge, Lord Chief Justice Best, who there delivered a most luminous argument, after time taken to consider, as the joint opinion of his Lordship, myself, and Mr. Justice Burrough—the facts of that case being not possibly distinguishable from this. But the weight of authority and of name does not rest here; for, in *Carlisle* v. *Garland* (*b*), Lord Chief Justice Tindal, and my brothers Bosanquet and Alderson, all maintained the same point. And again, that eminent Judge, the late Lord Tenterden, with the concurrence of my brothers Littledale, Taunton, and Patteson, in *Dillon* v. *Langley* (*c*), expressly like this case in every circumstance, says: The sheriff "must obey the writ, but he is also required to know whose goods he takes. We ought to consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff:" and then his Lordship refers to the case of *Carlisle* v. *Garland* as in point. Indeed, it is admitted in the Court below, that the cases of *Potter* v. *Starkie*, *Lazarus* v. *Waithman*, *Price* v. *Helyar*, *Carlisle* v. *Garland*, and *Dillon* v. *Langley*, cannot be distinguished either in facts or reasoning from the case now under consideration. I have formerly referred to the case of *Glaspoole* v. *Young*, as a much harder case against the

(*a*) 1 Moore & Payne, 541; S.C. 7 Bing. 298.
4 Bing. 597.
(*b*) 5 Moore & Payne, 102; S.C.
(*c*) 2 Barn. & Adolph. 131.

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sheriff than the present: I only mention it again for the sake of adding to the list of legal luminaries, who, for the last seventy-six years, have uniformly concurred in this opinion till now, the names of two eminent Judges, Mr. Justice (now Baron) Bayley, and Mr. Justice James Parke. If, therefore, I even thought the case of *Cooper* v. *Chitty* wrongly decided, as some of my brothers seem to think, I do not feel myself strong enough, nor would I feel myself justified, to set up my judgment against the immense host of those great men who have so long considered this as a closed and settled point of law.

I may add, without impropriety, that Lord Tenterden, in a conference with all the Judges who had heard this case argued, concurred in the opinion I have formed; and, when the opinions of that most eminent and most learned Judge are mentioned, they will claim and receive from every other Judge and lawyer the most profound and unfeigned attention and respect; especially when I find him in a case having no connection with this, declaring that the Judges of former times (and I speak of the uniform judgments of above seventy years) ought to be followed and adopted, unless we can see *very clearly* that they are erroneous; otherwise there would be no certainty in the administration of the law.

When, therefore, I find this law uniformly acted upon for much above seventy years, I rejoice, after a long judicial life, to declare my firm belief that a new practice on this point should not be introduced, and that it cannot be done without danger. For these reasons, and upon these authorities, I think the judgment of the Court of Exchequer ought to be reversed.

Lord Chief Justice TINDAL.—It has become unnecessary for me, after the full discussion which this case has undergone, to state at length the grounds upon which my judgment has been formed, or to comment upon the se-

veral cases which have already been brought under the notice of the Court. I shall endeavour, therefore, to compress, within as short a compass as is consistent with making myself intelligible, the reasons upon which my mind has been brought to the conclusion that the judgment of the Court below ought to be reversed.

The question arising upon the special verdict is in substance this: whether the sheriff, who has seized the goods of a defendant under a writ of *fi. fa.*, and has sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him, is liable to an action of trover at the suit of the assignees subsequently chosen under such commission. And upon this question I can arrive at no other conclusion, upon the construction of the statute upon which the bankrupt law now stands, without any reference to the cases decided on the point, than that the seizing and subsequent sale of these goods to the judgment-creditor is a wrongful conversion, so as to make the sheriff liable in an action of trover.

The answer to the question above put, rests upon two distinct propositions—first, that the goods in question were, at the time of the sale under the writ, the property of the assignees, having become their property by relation from the time of the act of bankruptcy—secondly, that there is no exception, either express or implied, in the bankrupt act, in favour of a sheriff executing the king's writ. I shall proceed to consider each of these propositions separately, and in order.

1. Upon the just construction of the late statute, the goods at the time of the sale belonged to the assignees, and the sale was a wrongful conversion, because it was a sale of their goods. That the ownership of the goods was not divested out of the bankrupt by the act of bankruptcy, or by the issuing of the commission, or by any

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other act than the execution of the commissioners' assignment, may indeed be readily admitted. If any authority were necessary for that point, the cases of *Cary* v. *Crisp* (*a*) and *Brassey* v. *Dawson* (*b*) are decisive upon the subject. But it seems equally clear, that, by the necessary construction of the clause by which the commissioners are directed to "assign all the bankrupt's money, goods, chattels, and debts, wheresoever they may be found or known;" such assignment, whenever made, shall operate, by relation, so as to carry to the assignees all the property which the bankrupt had at the time of the act of bankruptcy. The twelfth section of the recent act, 6 Geo. 4, c. 16, upon which the law now stands, varies indeed in some particulars of expression from the language of the earlier acts; but not so materially as to afford a ground for any difference of construction in this particular, in which it is certain no real difference could have been intended. It has been observed, in one case, by Lord Hardwicke, then Lord Chief Justice of the King's Bench, in *Brassey* v. *Dawson*, that this relation is a fiction of the law, and that fictions are not to be favoured. But I must confess myself unable to consider it as any fiction at all; for it appears to be the direct positive enactment of the legislature, expressed in plain and unequivocal terms. That such an enactment is indeed attended in some cases with hardship, must be admitted; but there seemed to have been no alternative for the legislature, but either to allow these individual cases of hardship, or to submit to a general inconvenience; for, unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such

(*a*) 1 Salk. 108. (*b*) 2 Str. 978.

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relation was intended is evident from the consideration, that, in various instances, where the individual hardship was greater than was warranted by the general convenience, the legislature has from time to time, by new statutes, cut down the relation in particular cases; as, first, in the case of payment of debts *to* the bankrupt before notice of an act of bankruptcy (1 Jac. 1, c. 15); next, in the case of the sale of real property *by* the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy (21 Jac. 1, c. 19); again, in the case of payments *by* the bankrupt to creditors for goods sold (19 Geo. 2, c. 32); and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission (46 Geo. 3, c. 65). All which provisions of the legislature do prove and establish two points—first, that such relation to the act of bankruptcy did at the time exist under the previous enactments—secondly, that nothing short of the authority of parliament was sufficient to relax the severity of the former law. The Courts of law have uniformly held such construction of the bankrupt acts. I will refer to one case only, namely, the judgment of Lord Hardwicke, when Lord Chancellor, in *Billon* v. *Hyde*(*a*), because it appears to me to import that at that time he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord Hardwicke observes—"It is said that this rule (the relation to the act of bankruptcy) founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one; which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it

(*a*) 1 Ves. sen. 326.

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is better to suffer a particular mischief than an inconvenience: and the legislature foresaw there would be a particular mischief, which they cured by that proviso; but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts; so, as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Upon these grounds it may, I think, be safely concluded that all the property belonging to the bankrupt at the time of his bankruptcy passes to his assignees by the commissioners' assignment, whatever may be the time at which such assignment is executed.

2. The second ground above referred to is, that there is no exception, express or implied, in the bankrupt act, in favour of the sheriff executing a writ after a secret act of bankruptcy. So that, whilst servants of the bankrupt, judgment-creditors, who set the law in motion, vendees at the sheriff's sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt after a secret act of bankruptcy, would confessedly be held guilty of a wrongful conversion, neither is the sheriff, by reason of his situation and character, exempted from the same liability. That there is no *express* exception, is evident from perusing the words of the statute: if there be any exception, therefore, it must be one that is implied. Now, the only ground upon which such implied exception in favour of the sheriff is contended for, resolves itself at last into the hardship of his case. It is said to be a hard measure to make him answerable where he is obliged to execute the writ, where he is acting honestly in the execution of his duty, and is under an invincible ignorance at the time that the goods are the property of the assignees. The question therefore is, whether

such hardship on the sheriff can be held upon any legal grounds to work an exception in his favour. If once this principle were to be admitted, it would operate not only in cases where the ignorance of the sheriff was really invincible, but in many others where a small exercise of caution, inquiry, and investigation would have been sufficient to prevent him from executing the writ: such a construction, therefore, in order to prevent a mischief to the individual in a few cases, would occasion an inconvenience to the creditors at large in many. Again, in how many other cases does the law hold him responsible where he is equally honest in the performance of his duty, and his difficulty in choosing the right course is equally great? In an execution against A., if he sells the goods of B. which are in A.'s possession and apparent ownership, by loan or otherwise, he is liable in trover to the rightful owner, even after he has paid over the money. If bail are tendered to him, which appear sufficient at the time, he is bound to accept them, and discharge the defendant from his custody; yet, if they fail before bail above is put in, the sheriff may become answerable in damages to the plaintiff, and not improbably for the amount of the debt. He is answerable generally, *civiliter*, for all acts of his bailiffs, for voluntary escapes permitted by them, and for extortion. If the hardship is urged in those cases, the answer is, that the officers give security to the sheriff; but it is obvious, that, if their securities fall short, he is answerable to the party in his purse or in his person. I would refer to the late case of *Glasspoole* v. *Young* (*a*) already stated by my brothers Park and Taunton, where the sheriff was held liable for the execution of his duty, under circumstances of ignorance equally invincible as the present. By analogy, therefore, to the law by which the sheriff's responsibility is governed in many other cases, the mere

(*a*) 9 Barn. & Cress. 696.

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circumstance of hardship ought not to form any ground of exemption from his liability in this particular case. After all, the office of sheriff is an office not of risk only, but one of profit also—so says Lord Mansfield expressly in the case of *Cooper* v. *Chitty*, so often referred to—an office of which men are ready to take the risk upon themselves for the sake of the profit, in the character of under-sheriffs, bailiffs, and other officers, giving the sheriff a sufficient indemnity to secure him against any damage or loss from acts done by them in his name. But the strongest argument against implying an exception in favour of the sheriff appears, to my mind, to be the course pursued by the legislature itself (above adverted to), who have by new and distinct statutes, from time to time, created new exceptions from the retrospective operation of the assignment, wherever the hardship to individuals was deemed sufficient to call for it. And, as the legislature has so done in many cases, but not interfered in the present, why is such exception to be ingrafted on the statute by us, whose duty it is to declare the law, and not to make it? Upon these grounds, therefore, it appears to me that no exception of any kind exists in the bankrupt act in favour of the sheriff, however honestly or innocently he may have acted in the execution of the writ directed to him, if he does, in fact, take under it, not the goods of the defendant in the suit, but those of his assignees. And this appears to me to dispose of the whole point in controversy; for, if the sheriff appears to be liable to the action upon the construction of the statute itself, without reference to any of the cases upon the point, I think it must at once be admitted that there is no such weight of authority in favour of the sheriff, from the decided cases, as to call for any contrary decision. Indeed, the weight of authority to be derived from the cases subsequent to that of *Cooper* v. *Chitty*, seems to be admitted, in the argument of this case in the Court of Exchequer, to be against the sheriff; but it is contended that

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all the later cases proceeded partly upon a misconception of the case of *Cooper* v. *Chitty*, and partly upon the ground that the earlier cases of *Bayly* v. *Bunning*, and some others, had not been brought to the attention of the Courts of law when deciding such later cases. I shall satisfy myself, therefore, with making a few observations upon the two cases of *Cooper* v. *Chitty* and *Bayly* v. *Bunning*, as the learned Judges who have preceded me in argument have gone into a more laboured detail of the modern cases; and I will only observe that they form a connected chain of decisions against the sheriff, some in each Court of common law at Westminster-Hall, for the last sixty years. Now, with respect to the case of *Cooper* v. *Chitty*, it may be admitted at once that it forms no authority for the present case. The seizure by the sheriff was indeed after a secret act of bankruptcy, but the sale did not take place until after the assignment, and at a time when both commission and assignment were known to the sheriff. There could, therefore, be no doubt but that such a sale, with such notice, was a wrongful conversion by the sheriff. Although, however, the facts of that case do not agree with the present, the judgment of Lord Mansfield lays down and adopts a broad distinction between the liability of the sheriff in an action of trespass, and his liability under the same circumstances in an action of trover—holding that the former action was not maintainable, but that the latter was. And it seems a sensible and rational distinction, that the sheriff, having acted innocently in the taking, should not be liable in that form of action in which the jury may give damages for the taking distinct from the value of the goods, but that he should, nevertheless, be subject to that action in which the proper measure of damages is the actual loss which the plaintiff has sustained by the sale; and the case of *Bayly* v. *Bunning*, when rightly understood, affords no authority in favour of the sheriff, where he has *sold* the

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goods. Upon looking at the record in that case, it appears that it was an action against Mawley, the judgment-creditor, and Bonynge, the bailiff of a hundred within the county of Northampton. The bailiff seized the goods after a secret act of bankruptcy; but he never sold the goods at all; for, the jury expressly find, "that the money, goods, and chattels, still remain in the hands of Bonynge, neither sold nor delivered to Mawley." And upon this finding the jury declare their doubt to be, whether the goods were well taken or not by pretext of the writ of *fi. fa.*; certainly, a very inartificial finding: and the Court, after argument, and time to consider, held that the original taking was lawful. The reporters do indeed put the decision upon the ground of the official character of the sheriff, because the taking by him was lawful by virtue of the writ. But, if the bailiff in that case, as in the present, had not only seized the goods, but had sold them, or delivered them over to the judgment-creditor, there is nothing in the case of *Bayly* v. *Bunning* to shew that he would not have been held guilty of a wrongful conversion. I look upon the case of *Bayly* v. *Bunning*, therefore, to be a single case, standing upon very peculiar circumstances, and decided upon very narrow grounds; and that, in effect, it says no more than that, if the sheriff makes a seizure in obedience to a writ, which seizure is lawful at the time, then, if he neither sells the goods, nor delivers them over to the judgment-creditor, but keeps them in his own hands as a stakeholder between the assignees and the judgment-creditor, the original act of taking shall not be held unlawful so as to sustain an action of trover. To that extent it shews the bailiff was favoured in his official character, but no further. But why, under the circumstances stated in that special verdict, a subsequent demand by the assignee, and a refusal to deliver up the goods to him, should not have been held a conversion, if the special verdict had been properly framed, I confess myself wholly

unable to discover. But, although the judgment of Lord Mansfield, in the case of *Cooper* v. *Chitty*, propounds a distinction between the responsibility of the sheriff, in the form of trespass and in the form of trover, not called for by the circumstances of that case, no one can deny that such distinction has been adopted in numerous decisions in the Courts of Westminster-Hall from that time to the present. It has been inserted in text writers on the law of bankruptcy as a distinction established by undoubted authority. It is laid down in digests of the law as an acknowledged principle. It has been acted upon by the practisers in Westminster-Hall of the present day, during the whole of their lives, without the slightest suspicion or doubt of its soundness. Judicial decisions in Courts of justice are ranked by Lord Hale as one of the grounds or constituents of the common law (*a*); and, if a series of judicial decisions are shewn, some in each Court of Westminster-Hall, from the time of *Cooper* v. *Chitty* down to the present period, in which the sheriff has been held liable in trover for seizing and selling after an act of bankruptcy, but before a commission; if neither the case of *Cooper* v. *Chitty*, nor the cases which preceded it, do, when rightly understood, contravene that principle—surely the question should be considered as at rest, even if the principle on which it was originally established were involved in doubt.

I cannot conclude without adding a much greater weight to the opinion which I have formed than that which otherwise might belong to it, by stating, that, upon the discussion of this case amongst the Judges, after the argument, the late eminently learned and accurate Lord Chief Justice of the King's Bench declared it to be his opinion, that, from the numerous decisions in the Courts of Westminster-Hall, the law was settled against the sheriff, so that it was no longer a subject for argument; and that,

(*a*) Hale's History of the Common Law, c. 4.

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even if the question were *res integra*, he should come to the same conclusion.

For the reasons, therefore, which I have stated above, I think the present judgment should be reversed.

Judgment reversed.

END OF HILARY TERM.

In the Common Pleas.

EASTER TERM, 3 WILL. IV.

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Monday, April 15th.

MILLARD, Gent., One &c., *v.* MILLMAN.

THE defendant in this cause being in the custody of the Marshal, on process out of the Court of King's Bench, a writ of *detainer* was issued out of this Court at the suit of the present plaintiff, and duly served upon the Marshal, in pursuance of the statute 2 Will. 4, c. 39, s. 8. The officer of the Court conceiving that the plaintiff could not declare against the defendant in this action whilst in the custody of the Marshal of the King's Bench, the plaintiff sued out a *habeas corpus* to remove him to the Fleet prison.

Since the statute 2 Will. 4, c. 39, s. 8, it is not necessary to remove by *habeas corpus* a prisoner in the custody of the Marshal of the King's Bench, to the custody of the Warden of the Fleet, in order to declare against him in this Court, where the action is commenced by writ of *summons* or *capias* under the authority of that act.

Mr. Serjeant *Goulburn*, on the part of the defendant, now moved to enlarge the time for returning the writ until the last day of the present term. He moved upon an affidavit stating that the defendant was eighty-six years of age, and in a very bad state of health; and also upon the affidavit of a medical man, who swore that the defendant was not in a fit state to be removed, and that his removal would be likely to endanger his life.

Lord Chief Justice TINDAL.—Formerly, where a defendant was already in custody on process out of the Court

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of King's Bench, it was necessary to remove him by *habeas corpus* into the custody of the Warden of the Fleet prison, before a plaintiff could declare against him in this Court (*a*): but it is not now, I think, indispensable that he be in the custody of this Court.

Mr. Justice ALDERSON.—There was no necessity for a writ of *habeas corpus* to enable the plaintiff to declare in this case. One of the objects of the statute 2 Will. 4, c. 39, s. 8, was, to remedy this inconvenience. It enacts, "that, when it shall be intended to detain in any such action (*b*) any person being in the custody of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet prison, the process of detainer shall be according to the form of the writ of *detainer* contained in the schedule to this act, and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; *and such process may issue from either of the said Courts*, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be, and the proceed-

(*a*) The antient practice is thus stated by Mr. Tidd—Prac. 9th edit. pp. 349, 356.

"When the defendant, being charged with process issuing out of the King's Bench, is removed, *before* declaration, from the custody of the sheriff or marshal to the Fleet prison, the plaintiff cannot proceed further in that Court; but must either declare against him in the Common Pleas, or remove him into the custody of the marshal, by writ of *habeas corpus ad respondendum*, in order to charge him with a declaration. But, where a defendant is removed to the Fleet prison *after* declaration, the action must proceed in that Court where the plaintiff declares."

(*b*) Personal actions commenced by writ of *summons* or *capias* under the authority of the act.

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ings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rules to be made by the Judges of the said Courts."

The rest of the Court concurring—

Rule refused.

BOWYEAR, Demandant, BOWYEAR and Another, Tenants.

Tuesday, April 16th.

The Court refused to order the proceedings in a writ of right to be stayed until payment to the tenant of the costs of two actions of ejectment which had been brought in the King's Bench for the recovery of the same premises, and in which actions the demandant had failed.

MR. Serjeant *Wilde*, on the part of the tenants, in the course of the last term obtained a rule calling on the demandant to shew cause why all further proceedings in this action should not be stayed until the demandant should have paid to the tenants, their attorney or agent, their costs of and occasioned by two several actions of ejectment and a suit in Chancery (*a*). The application was founded upon an affidavit of the attorney for the tenants, which stated, that, in Hilary Term, 1822, the demandant commenced an action of ejectment in the Court of King's Bench for the recovery of certain premises formerly belonging to the father of the demandant; that, in that action, the demandant failed in proving his title to the premises sought to be recovered, and was nonsuited; that the demandant afterwards, in Trinity Term, 1822, commenced another action of ejectment in the Court of King's Bench, for the recovery of the same premises as those claimed in the former action of ejectment; that, upon an application made to the Court of King's Bench, on behalf of the tenant, T. K.

(*a*) That part of the rule which related to the costs of the suit in equity was afterwards withdrawn, it being admitted that a Court of law could not thus interfere with costs in equity. See *Doe.* d. *Williams* v. *Wisch*, 3 Barn. & Ald. 609, where the Court of King's Bench refused to stay the proceedings in an ejectment until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, were paid.

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Bowyear, that Court ordered that the proceedings in the second action of ejectment should be stayed until the demandant should pay the said tenant, T. K. Bowyear, his costs and expenses incurred in defending the said first mentioned action of ejectment; and that the said second action of ejectment had not further been proceeded in: that, in June, 1825, the demandant filed a bill in the High Court of Chancery against the said tenant, T. K. Bowyear, praying that he might be decreed to give up possession to the demandant of the real estate therein mentioned, and which was therein alleged to be the same as that for which the said second action of ejectment had been brought; and that the deponent verily believed that the premises sought to be recovered by the demandant in this action were the same premises as those for the recovery of which the said two several actions of ejectment were brought by the demandant; and that the demandant had not paid the costs of the said tenant, T. K. Bowyear, in defending either of the said two actions of ejectment or the said suit in Chancery, or any of them, or any part thereof.

Mr. Serjeant *Ludlow* now shewed cause.—He relied upon the case of *Chatfield and Wife*, dem., *Souter*, ten. (*a*), where the Court refused to order the proceedings on a writ of right to be stayed until payment to the tenant of the costs of a former action of ejectment, between the same parties, for the recovery of the same premises—Lord Chief Justice Best observing: " The proceeding by a writ of right is altogether different from that of ejectment; and, even in an action of the latter description, where the Courts order the proceedings in the cause to be stayed until the costs of a former one are paid, it frequently operates with great hardship; but the hardship would be still greater if we were to extend that practice to writs of right, as it

(*a*) 10 J. B. Moore, 572; S. C. 3 Bing. 167.

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might frequently prevent a poor man from asserting a just title, or prosecuting his suit against another who had none." He also referred to the note to the case of *Doe* d. *Walker* v. *Stevenson* (*a*) where all the prior cases are collected, and where the distinction between the practice of the Court of King's Bench and of this Court in this respect is pointed out.

Mr. Serjeant *Wilde*, in support of his rule.—All the authorities are collected by Mr. Tidd (*c*), who deduces from them these principles: "In a second ejectment, the Courts will stay the proceedings until the costs are paid of a prior one for the trial of the same title; and also the costs of an action, if any has been brought, for the mesne profits. In other actions, it was not formerly usual to stay the proceedings in a second action until the costs were paid of a prior one for the same cause; and particularly if the merits did not come in question on the former trial. In actions for the recovery of a debt, though the Courts will not in general stay the proceedings in a second action until the costs of a former one are paid, yet of late years this has been done in several instances, on the ground of vexation; and that whether the former action was in the same or a different Court." The Court will not allow the same title to be put in agitation wantonly in several different actions, or suffer a party to proceed with trial after trial at the expense of his opponent. In *Chatfield*, dem., *Souter*, ten., the ejectment cause had not been tried, the record having been withdrawn; which materially distinguishes that case from the present.

Lord Chief Justice TINDAL.—It appears to me that the case of *Chatfield*, dem., *Souter*, ten., is too strong an authority to permit us to decide against it on the present oc-

(*a*) 3 Bos. & Pul. 23. (*b*) Tidd's Practice, 9th edit., 538, 9.

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casion. Where the form of action is the same, the Courts will not allow the defendant to be harassed with a second to try the same right, whilst the costs of the first remain unpaid. But this is a real action, which raises a very different question from that which arises in an action of ejectment. The action of ejectment may have failed by reason of a variety of circumstances quite beside the merits of the case. The demandant is pursuing a remedy which the law allows; and there may be a substantial difficulty in the way of his proceeding by ejectment. Upon the reason and authority of the case of *Chatfield*, dem., *Souter*, ten., I am of opinion that this rule ought to be discharged.

Mr. Justice PARK.—This is an entirely different proceeding from the former. I adhere to the opinion I expressed in *Chatfield*, dem., *Souter*, ten., which I cannot distinguish from the present case.

Mr. Justice GASELEE.—I think it impossible to get over the case of *Chatfield*, dem., *Souter*, ten. Mr. Justice Burrough there says (*a*): The same question cannot arise in an action of ejectment as in a writ of right; for, in the one, the lessor seeks to recover possession on his legal title, whilst in the other the demand is founded on the mere right."

Mr. Justice ALDERSON concurring—

Rule discharged, without costs.

(*a*) 10 J. B. Moore, 573.

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Tuesday, April 16th.

GOODBURNE *v.* BOWMAN and Others.

In an action for a libel, the defendants pleaded the general issue and six special pleas of justification. At the trial, the jury found for the defendants upon the issues raised on five of the special pleas, and for the plaintiff upon the other issues. The plaintiff afterwards obtained a rule for entering judgment *non obstante veredicto* upon the issues that had been found for the defendants, on the ground that the pleas on which those issues were taken were bad in point of law:—*Held*, upon the construction of the 74th rule of Hilary Term, 2 Will. 4, that neither party was entitled to the costs of those issues.

THIS was an action for a libel. The defendants pleaded the general issue, and six special pleas of justification. To the special pleas the plaintiff replied *de injuriâ*. At the trial before Mr. Justice James Parke at the last Summer Assizes for the county of York, the jury found for the plaintiff on the general issue, and also upon the issue raised upon the 5th plea of justification, with one farthing damages; and for the defendants on the other five issues. In Michaelmas Term last a rule *nisi* was obtained on the part of the plaintiff to enter up judgment *non obstante veredicto* on the issues found for the defendants, on the ground that the pleas on which those issues were raised were bad in law. After argument, and time taken to consider, the Court, in the last term, made the rule absolute; holding that, taking together the whole of the allegations in the respective pleas, they fully amounted to a confession of the cause of action (*a*).

On the taxation of the costs, the Prothonotary allowed the plaintiff the costs of the issues that had been found for the defendants, on the ground that they had ultimately proved to be immaterial, and the plaintiff had obtained judgment upon them.

Mr. Serjeant *Wilde*, in the last term, on the part of the defendants, obtained a rule *nisi* that the Prothonotary might review his taxation in this respect. He contended that the defendants were entitled to the costs of those issues that were found for them at the trial, notwithstanding the Court afterwards decided them to be immaterial.

Mr. Serjeant *Jones* and Mr. Serjeant *Stephen* now shewed cause.—The question arises upon the construction of

(*a*) *Vide ante*, Vol. 2, Hilary Term.

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the 74th rule of Hilary Term, 2 Will. 4, by which it is ordered, that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not *succeeded*; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." Does this rule intend that a defendant should have costs deducted for issues raised upon pleas that are bad in law? [Mr. Justice Gaselee.—If the pleas were bad, the plaintiff should have demurred.] In *Cartwright* v. *Cook* (*a*), it was held, that where, after verdict for the plaintiff, subject to a special case, one of the defendant's pleas is held bad, he is not entitled to the costs of witnesses in support of that plea. Mr. Justice James Parke there said: "If the plaintiff had demurred, he would have been entitled to the costs of the demurrer. As it was clear the plea could not be supported, it is not just that the plaintiff should have to pay the costs of the witnesses in support of that plea." [Lord Chief Justice Tindal.—The objection to the set-off in that case arose upon the evidence: the defendant failed in proving it.] The object of the rule will in a great measure be defeated if the defendants be held entitled to costs. The question whether or not the plaintiff was entitled to costs in such a case as the present, was first raised in *Kirk* v. *Nowill* (*b*). That was an action of trespass. The defendant pleaded the general issue and three special pleas of justification. At the trial, a verdict was given for the plaintiff on the general issue and the two first justifications, and for the defendant on the last justification. A rule was afterwards made to enter up judgment for the plaintiff on the general issue and the two first pleas of justification, notwithstanding the verdict for the defendant on the last justification, the same being insufficient in point of law. Upon a rule to shew cause why the Master, in the taxation of costs, should not allow such costs only as were incurred

(*a*) 1 Dowl. Pr. Cas. 529. (*b*) 1 Term Rep. 266.

upon the issues found for the plaintiff, without allowing to the plaintiff any costs upon the issues found for the defendant, Mr. Justice Buller said: "All the late cases are decidedly against the plaintiff. Suppose the judgment had been arrested, no costs would have been given. The reason is obvious; the plaintiff has contributed to the costs, as well as the defendant. He should have demurred to the defendant's plea; and, by going on to trial, he is equally in fault." At the time of that decision, there existed an act of parliament (*a*) giving costs to a defendant who obtained a verdict. It was not contended there that the defendant was entitled to any costs: and the Court say, that, both parties being in the wrong, neither was entitled to the costs of the issue that proved to be immaterial. The same argument might have been used for the defendants in that case as is now urged here. Upon the consideration of acts of parliament and rules of the Courts, the question is, whether or not the construction contended for is within the policy or good sense of the law. Applying that test here, the proper construction of this rule extends it only to such issues found for the defendants upon which they may obtain judgment. Here the judgment is against the defendants. The Court cannot give costs where a party has no judgment, and cannot by possibility obtain one; for, the costs of a cause (except costs of motions, or other incidental proceedings) follow the judgment. How, in such a case as this is judgment to be entered for these costs? [Lord Chief Justice Tindal.—By the language of the rule, the costs are to be deducted.] The rule was intended only to afford a more equitable adjustment of the costs; not to give costs where the law had not already given them. That is a matter beyond the jurisdiction of the Courts. The form of the judgment *non obstante veredicto* is, in effect, that the verdict shall be absolutely null and void: it would not be void, if the defendant were to be entitled to costs upon it.

(*a*) 23 Hen. 8, c. 15, s. 1.

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As to the allowance of costs to the plaintiff—It may be conceded, that, before the rule, the plaintiff was not, in a case like this, entitled to costs: *Kirk* v. *Nowill* seems to be a decisive authority on that point. The question therefore rests upon the language of the former part of the rule —"no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not *succeeded*." Has not the plaintiff succeeded here? He has obtained the judgment of the Court. It is impossible to conceive a term more general. At all events, if not within the words, the plaintiff is clearly within the meaning of the rule.

Mr. Serjeant *Bompas*, in support of the rule, was desired by the Court to confine himself to the first point, as to the defendants' claim.—The plaintiff had no right to put the defendants wantonly and unnecessarily to the expense of a trial upon immaterial issues; he should have demurred. Notwithstanding the judgment that has been entered by the direction of the Court upon the five issues that were found at the trial for the defendants, the verdict upon those issues still remains upon the record: the defendants may bring a writ of error, and may prove ultimately to be entitled to judgment thereon. The words of the rule are perfectly intelligible, and cannot be misunderstood. The defendants are entitled to the costs of all issues *found* for them.

Lord Chief Justice TINDAL.—The questions in this case arise upon the construction of a rule which the Courts of Westminster-Hall have recently pronounced, and resolve themselves into two points—first, whether, on the construction of that rule, the plaintiff was, under the circumstances, entitled to the general costs of the cause—secondly, whether the defendants were entitled to deduct the costs of those issues which on the trial were found for them. Upon the best consideration that I have been able to give this case, it appears to me that neither party is entitled to

costs.—First, as to the plaintiff's right—It arises upon the first part of the rule—"no costs shall be allowed on taxation to a plaintiff upon any *counts* or *issues* upon which he has not succeeded." The ground upon which I hold that the plaintiff is not entitled to the costs is, that, with respect to those five pleas the issues upon which were found for the defendants, the plaintiff cannot be said to have succeeded. If the declaration had consisted of one count only, and that had proved to be bad, it is clear that the plaintiff would not have been entitled to the costs of the cause. If that be so, why is he to be held entitled, where there are several issues, some of which are found against him, to the costs of those issues? It seems to me that, the issues in question having been, by the finding of the jury, decided against him, although he has since got rid of the effect of that finding, its effect upon his claim for costs is not removed. The only object of the rule that has been made absolute for him is, to put those issues out of the way of his obtaining judgment upon the whole record.—Secondly—with regard to the defendants' claim for a deduction of the costs of the issues found for them. It appears to me, upon the proper construction of the latter part of the rule, that, to entitle the defendants to the deduction, the issues must be such as by possibility they might have succeeded upon. The word "issues" must be intended in the same sense in both clauses of the rule: the defendants are only entitled to costs on real issues. Suppose that there had been only one plea pleaded, and that had raised an immaterial issue, and the jury had found for the defendants, and the plaintiff had afterwards obtained leave to enter up judgment *non obstante veredicto;* it would be a very hard construction, to hold that the defendants were entitled to the costs of the whole cause, although ultimately the judgment was against them. It seems to me that this is *casus omissus*, and that we shall best consult the interests of justice by holding that neither party is entitled to the costs in question.

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Mr. Justice GASELEE.—Upon the first part of the rule, it appears to me that the plaintiff clearly is not entitled to the costs of the issues found for the defendants. The rule in its terms expressly applies to proceedings at *Nisi Prius*. The pleas in question being bad, the plaintiff ought to have demurred: having chosen to go to trial upon the issues raised upon those bad pleas, he is not in justice entitled to costs. In the common case of a motion on the part of a defendant in arrest of judgment, he is not entitled to costs even if successful. That appears to me to be a conclusive argument to shew that the plaintiff is not entitled in this case.—With regard to the other point, I should have been better satisfied had it undergone further consideration: for, at present, I am rather inclined to think, that, as the issues were at the trial found for the defendants, they ought to have their costs deducted.

Mr. Justice ALDERSON.—I concur with my Lord Chief Justice, that the counts and issues intended by the rule must be such as are good in point of law. Here, the plaintiff has not succeeded upon the issues that were found for the defendants; he has succeeded notwithstanding those issues were found against him.—Upon the second point, I think that, to entitle them to costs, the issues found for the defendants must be such whereon they might have judgment. In *Cox* v. *Thomason* (*a*), the declaration contained eighteen counts, nine for a malicious prosecution, and nine for slander. The defendant pleaded the general issue, and the jury found for the plaintiff on three counts, and for the defendant on the remaining fifteen; and it was contended that the plaintiff was entitled to the general costs of the cause, because he was entitled to judgment upon the whole record: but the Court held that the plea of the general issue to the whole declaration raised

(*a*) Cited in *Knight* v. *Brown*, *ante*, Vol. 2.

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a separate and distinct issue upon each count, and that the defendant was entitled to deduct from the general costs the costs of those counts the issues upon which had been found for him.

Mr. Justice PARK.—I at first entertained considerable doubt, and therefore had not intended to offer any opinion; but, having heard my Lord Chief Justice, I think it right to state that the manner in which his Lordship has put the case has reconciled me to concur with him and my brother Alderson. If the declaration had contained only one count, and the jury had found for the plaintiff upon that count, and their verdict had afterwards been set aside on a ground of a defect in the count, the plaintiff clearly would not have been entitled to costs. So, if there had been but one special plea, and, after a finding for the defendants thereon, it had been decided by the Court to be bad in point of law, it is equally clear that the defendants would not have been entitled to the costs of the cause. I therefore concur in thinking that the defendants in this case are not entitled to the costs of those issues which were found for them by the jury, but afterwards held to have been immaterial and bad in point of law.

Rule absolute, without costs.

Thursday, April 18th.

Mr. Justice GASELEE on this day said, that, since the Court rose yesterday, he had re-considered the second point; and now agreed with the rest of the Court, that the defendants were not entitled to the costs of the issues found for them at the trial.

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Wednesday, April 17th.

MORGAN *v.* BIRNIE.

In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price and all disputes arising in or about the premises: and the defendant (the employer) agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof; and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction:— *Held*, that the surveyor's certificate was a condition precedent to the plaintiff's right to sue upon the contract in respect of alterations.

THIS was an action upon a building contract. The agreement contained, amongst others, the following proviso:—

"That, in case it shall be deemed necessary by the said G. Birnie, his executors or administrators, or his or their surveyor, to make any alterations or additions to or omissions from the works hereinbefore contracted for and specified, he or they shall be at liberty so to do; but no additions or alterations shall be admitted unless directed by the said G. Birnie, his executors or administrators, or his or their surveyor, in writing; nor shall any additions to or alterations of the works hereby contracted for vitiate or vacate the contract hereby made, but the price or allowance to be made in respect of any agreed additions or alterations shall be added to or deducted from the monies that shall be or might become payable by virtue of these presents, as the case may require: such price or allowance being first estimated or settled by the surveyor or architect of the said G. Birnie, who shall be sole arbitrator in settling such price or allowance, and all disputes that shall or may arise in or about the premises: and the said G. Birnie hereby promises and agrees, in consideration of the buildings and works to be done and executed by the said T. Morgan, in manner aforesaid, that he, the said G. Birnie, will pay or cause to be paid to the said T. Morgan the sum of 1250*l.* of lawful money of Great Britain in manner following, that is to say, that he will pay or cause to be paid such a sum of money as will be equal to three fourth parts of the price of the works hereby contracted for, which shall have been executed and performed according to the true intent and meaning of these presents, *upon receiving a certificate in writing*, signed by A. B. Clayton, or other the architect of the said

testifying that the flooring joists of the first story dwelling-house have been actually laid, and his of the works so executed; such further sum of will be equal to three fourth parts of the price of the further works that shall have been done tly to the date of the architect's said certificate, completion of the carcase of the dwelling-house; lance or sum which shall be found due to the said n after deducting the two previous payments, o calendar months after receiving the said archi- certificate that the whole of the buildings and works hereby contracted for have been executed and completed to his satisfaction."

The action was brought to recover the amount of the plaintiff's charges for alterations and additions, an account of which had been delivered by him, and examined and approved by Mr. Clayton, who had gone over the bill item by item, and settled the sum to be paid; but there was no formal certificate of Clayton's approval of the mode in which the works had been done. It was thereupon objected, on the part of the defendant, that the plaintiff was not entitled to recover, inasmuch as he had failed in proving that which amounted to a condition precedent to his right to sue upon the contract, viz. Clayton's certificate.

Lord Chief Justice Tindal, before whom the cause was tried at the Sittings at Guildhall after the last term, assented to the objection, and nonsuited the plaintiff, reserving to him leave to move to set aside the nonsuit and enter a verdict, if the Court should be of opinion that the condition was substantially complied with.

Mr. Serjeant *Spankie*, accordingly, now moved for a rule nisi.—The only matter in dispute was the bill for extras and additions. If the certificate of Clayton's approval of the manner in which the works had been done was a condition precedent to the plaintiff's right to recover upon the

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MORGAN v. BIRNIE.

contract for the alterations, that condition has been substantially and sufficiently complied with by his going through and settling the account. The mode of the execution of the work was not then in dispute. With reference to the extras, all that was required was, a mere estimate and settlement of the price.

Lord Chief Justice TINDAL.—The difficulty that lies in the plaintiff's way is rather one of his own seeking. He should, before commencing this action, have applied to Clayton for the certificate required by the contract. The question is, whether Clayton's certificate was not a condition precedent to the plaintiff's right to sue upon the agreement. I thought at the trial that it was; and I am not satisfied that the conclusion I then came to was wrong. The first part of the agreement relates to the mode in which the works are to be done. It then provides that "any additions to or alterations of the works contracted for shall not vitiate or vacate the contract thereby made; but the price or allowance to be made in respect of any agreed additions or alterations shall be added to or deducted from the monies that shall be or might become payable by virtue of these presents, as the case may require; such price or allowance being first estimated or settled by the surveyor or architect of the said G. Birnie, who shall be sole arbitrator in settling such price or allowance and all disputes that shall or may arise in or about the premises." It then proceeds to make certain stipulations as to the times and mode of payment, which was to take place at three specified periods—the first, upon the defendant's receiving a certificate in writing, signed by Clayton, or other the architect of the defendant, testifying that the flooring joists of the first story had been laid, and his approval of the works so executed—the second, on the completion of the carcase of the house—and the balance within two calendar months after receiving the architect's certificate that the whole of the works

contracted for had been completed to his satisfaction. That seems to me to involve the alterations. The question, then, is, has the time arrived at which the plaintiff may sue upon the contract? Unless the checking of the account of the plaintiff's charges for alterations and additions, and the ascertaining the balance, amount to such a certificate as that stipulated for, there has been no performance of the condition that in my opinion must precede the plaintiff's right to put the contract in force. It appears to me that the fact of the surveyor going over the account is very different from his giving the certificate required by the agreement: the one is an approval of the mode of doing the work; the other, a mere adjustment of the price. Upon the whole, it seems to me that there has been a failure on the part of the plaintiff in doing that which the agreement has made a condition precedent to his right to recover for a breach of it, and therefore that the nonsuit was proper.

Mr. Justice PARK.—The case is too clear to admit of doubt. Two things are stipulated by the agreement to be done by Clayton—the one, to ascertain the amount to be paid by the defendant for alterations from or additions to the contract; the other, to certify his satisfaction as to the mode in which the contract has been performed. The latter has not been done, and therefore the plaintiff was properly nonsuited.

The rest of the Court concurring—

Rule refused.

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Wednesday, April 17th.

ALLAN and Another *v.* KENNING.

On motion for a nonsuit on the ground of a variance between the declaration and the contract of guarantie therein set out, or for a new trial on the ground that the guarantie was not continuing, the Court, being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiffs for the sum secured, should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial and of the motion. On taxation, the officer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs:—*Held*, that he had done right.

THIS was an action of assumpsit upon a guarantie given by the defendant as surety for one Couchman. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Guildhall after the last Michaelmas Term, when a verdict was found for the plaintiffs, damages 100*l.*, the amount mentioned in the guarantie. In the course of the last term, a rule *nisi* was obtained on the part of the defendant for a nonsuit, on the ground (as it was contended) that the guarantie was not continuing, and therefore had been discharged by payments to a larger amount made by Couchman subsequent to its date; and also on the ground of a variance between the statement of the contract in the declaration, and the contract itself. On cause being shewn against this rule (*a*), the Court held that the guarantie was a continuing guarantie, and therefore the defendant was liable thereon; but that the cause of action was not properly described in the declaration; and that the rule should be made absolute, with liberty to the plaintiff to amend his declaration. In order, however, to obviate the necessity of a second trial, the parties consented that the verdict should stand for the sum awarded by the jury, and that the defendant should be at liberty to deduct therefrom the costs *of the trial* and of the motion. On taxation, the Prothonotary allowed the plaintiffs the costs up to the notice of trial, but disallowed all costs of the trial, including the briefs and counsel's fees; and allowed to the defendant all costs subsequent to the notice of trial.

Mr. Serjeant *Wilde* now moved that the Prothonotary might be directed to review his taxation.—He contended that this was not pursuing the intention of the rule pronounced by the Court; that, if the objection to the form of

(*a*) *Vide ante*, Vol. 2, Hilary Term.

the declaration had been taken at the trial, the Judge would have allowed the record to be amended at once, and then the utmost costs the defendant would have been entitled to would have been the costs of the day (*a*); and that there was no reason why the plaintiff should be deprived of the general costs of the cause; for, the same briefs would have been used had the cause gone down again.

Lord Chief Justice TINDAL.—The intention of the Court in pronouncing the rule in this cause in the last term was, to place the defendant in the same situation as he would have been in had a new action been brought, and he had let judgment go by default: and that intention would be attained by allowing him to have the entire costs of the former trial deducted from the plaintiff's costs. It seems to me, therefore, that the Prothonotary has done right.

Mr. Justice ALDERSON.—On the former occasion the Court thought that there ought to have been a nonsuit, by reason of the improper form of the declaration. If, therefore, the defendant had pressed it, he must have had a nonsuit. What right then had the Court to take from him that which he was entitled to? The rule pronounced was

(*a*) Under the statute 9 Geo. 4, c. 15, which enacts "that it shall and may be lawful for every Court of record holding plea in civil actions, any Judge sitting at *Nisi Prius*, and any Court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs, if any, to the other party as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared."

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ALLAN v. KENNING.

matter of agreement between the parties, to save the unnecessary expense of the trial of a matter which the Court then decided to be clear.

The rest of the Court concurring—

Rule refused.

Thursday, April 18th.

A threshing machine, not a fixture, is liable to a distress for rent, unless in *actual* use at the time, or there be other sufficient distress upon the premises.

The plaintiff let to one J. S. a threshing machine; on Saturday afternoon J. S. ceased working it; and, the plaintiff having a considerable distance to convey it home, it was left on the premises of J. S. till the following Monday morning, when it was distrained by the landlord for rent:—*Held*, that, in the absence of proof of a sufficient distress *aliunde*, the machine was well taken.

FENTON *v.* LOGAN.

THIS was an action of replevin. The declaration charged the defendant with taking and unjustly detaining a threshing machine of the plaintiff at Long Melford, in the county of Suffolk. The defendant avowed for rent in arrear for four years ending the 11th October, 1831, in virtue of a tenancy by one William Crissell, since deceased, and one William Farrow, his executor.

The plaintiff pleaded—first, *non tenuerunt*—secondly, *riens in arreare*—thirdly, that the threshing machine was an implement of trade—fourthly, that, before and at the time when &c., William Farrow, then being in the occupation of the close in which &c., carried on the business of a farmer there, *and used the threshing machine as a necessary implement in the said business*, and at the said time when &c. the threshing machine was there *in actual use* in the said business; and this &c.—fifthly, that, before and at the time when &c., William Farrow, then being in the occupation of the close in which &c., carried on the business of a farmer there, *and used the threshing machine as a necessary implement in the said business;* and that, at the time when &c., *there was other sufficient distress upon the close in which &c.*

Replication—*similiter* to the first and second pleas—to the third, that Farrow was not carrying on the business of a farmer in the close in which &c., and using the threshing machine as a necessary implement in his business—to

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the fourth, that the threshing machine was not in actual use—to the fifth, that there was not a sufficient distress upon the premises other than the threshing machine (*a*).

The cause was tried before Mr. Baron Bolland, at the last Assizes at Bury St. Edmonds. It appeared that the threshing machine was not a fixture, but was one which the plaintiff, the owner, was in the habit of letting on hire; that it had been so let to William Farrow; and that the corn in the threshing of which he had employed it had been all threshed out late on Saturday, the 4th September, 1832; but that, having a considerable distance to convey it, the plaintiff suffered it to remain on Farrow's premises until the following Monday morning, when it was seized by the landlord for arrears of rent due from Farrow's testator (Crissell) and himself, as executor. There was no evidence of any sufficient distress *aliunde* being upon the premises at the time of the distress. A verdict having been found for the defendant—

Mr. Serjeant *Storks* moved for a rule *nisi* to set it aside, and that a new trial might be had.—The machine in question was an implement necessary to the trade of the tenant as a farmer; or at least one with which such business could be more conveniently carried on: and it may be said to have been in use at the time of the distress; for it was in actual use on the Saturday evening, when it was clearly protected, and such protection would extend to a reasonable time for taking it away. Whether, therefore, it was protected as an implement in actual use or not, was a mixed question of law and fact, upon which the learned Baron ought to have directed the jury. *Gorton* v. *Falkner* (*b*) is an authority to shew that implements of trade in actual use are not liable to be distrained, unless it

(*a*) There were four several avowries, differing only in the amount of rent claimed to be due. The like pleas were pleaded to each avowry.

(*b*) 4 Term Rep. 565.

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appear that there was no other property upon the premises to satisfy the landlord's claim. The like was held in *Simson* v. *Harcourt* (*a*). [Mr. Justice Alderson.—In *Simson* v. *Harcourt*, the article distrained was a stocking-frame, in which there was a stocking, at the time of the distress, in process of manufacture.]

Lord Chief Justice TINDAL.—The plaintiff seeks to set aside the verdict that has been found by the jury, on the ground that the threshing machine seized by the defendant was an implement of trade, and as such privileged from being taken as a distress for rent. There are distinct and different grounds upon which various articles are privileged from distress; as, where goods are sent to a tradesman or artificer in order to have some work performed upon them; in which case they are absolutely privileged. Other articles are protected conditionally; such as beasts of the plough, which cannot be taken provided there be sufficient property upon the premises *aliunde* to satisfy the rent due. Again, implements of trade, if in actual use, and there be likewise a sufficient distress *aliunde*. In that case, too, the protection is merely conditional: and I am of opinion that the threshing machine in question was not shewn to be within the exception. It was not in actual use. The whole purpose for which it had been sent to the premises was completed on the Saturday; and the distress was levied on the Monday. Whether privileged or not, however, at all events there was no evidence that there was any other property upon the premises which could have been taken; the second condition therefore wholly failed. The case of *Wood* v. *Clarke* (*b*) is, I think, conclusive upon both points. It was there held that materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, are privileged from distress for rent due

(*a*) Cited in *Gorton* v. *Falkner*, 4 Term Rep. 568.
(*b*) 1 Cromp. & Jerv. 484.

from the weaver to his landlord: but a frame or other machinery delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due. That case seems to me to go the whole length of the present. I am therefore of opinion that the rule should not be granted.

Mr. Justice PARK.—I am of the same opinion. The case of *Gorton* v. *Falkner* is precisely adverse to this application. It was there held that a stocking-frame in actual use is not distrainable, *unless there is not other sufficient distress upon the premises.* Was the threshing machine in the present case in *actual* use at the time of the distress? It is impossible to say that it was: it clearly ceased to be in use, and therefore to be protected, on the Saturday night. This is not unlike the case of a horse, which cannot be distrained whilst a man is on his back, but which may be taken as soon as it ceases to be used.

Mr. Justice GASELEE.—The two material pleas are the fourth and fifth: the fourth states, in substance, that Farrow carried on the business of a farmer, and used the threshing machine as a necessary implement in the said business, and that, at the time of the distress, the machine was in actual use; upon that, issue is taken on one fact, viz. that the machine was in actual use. The fifth plea states that Farrow carried on the business of a farmer, and used the threshing machine as a necessary implement in the said business, and that, at the time of the distress, there was other sufficient distress upon the premises; issue is taken on this last allegation. There was no evidence to shew that there was any distress *aliunde;* neither did it appear that the machine was actually in use on the day upon which

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it was seized. I therefore concur in thinking that there should be no rule.

Mr. Justice ALDERSON concurred.

Rule refused.

Tuesday, April 18th.

JAY *v.* BYLES.

A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts), and certified that he had over-ruled them. The arbitrator's decision upon these points, as abstract propositions, being correct—The Court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award.

ALL matters in difference in this cause were by an order of *Nisi Prius* referred to the arbitration of a barrister. The order of reference contained the following provision—"That the arbitrator shall state on his award any point or points of law raised by either party in reference to the matters hereby referred." The arbitrator, in his award, after adjusting the amount of damages, proceeded thus: "And I do certify and declare that the following objections and points of law have been raised before me on behalf of the defendant in reference to the matters so as aforesaid to me referred, that is to say—first, 'that no action at law will lie by one partner against another for money paid or work and labour performed by one partner on behalf of the partnership'—second, 'that no action will lie for contribution for damages paid by one partner for the partnership in respect of a tort'—third, 'that no verdict can be maintained by one partner against his copartner for contribution for damages awarded against that one in an action on the case for negligence, where the cause of action accrued during the partnership'—and fourth, 'that no action will lie by one partner for contribution for damages awarded generally for causes of action accruing during and subsequent to the dissolution of partnership.' But it appearing to me, after hearing the arguments of counsel upon the said objections, and upon consideration of the evidence adduced before me in the said reference, that none of the said objections ought

to prevent the plaintiff from maintaining the said action against the defendant, I have over-ruled the same."

Mr. Serjeant *Merewether*, in the last term, moved that the award might be referred back to the arbitrator to be amended by setting forth the facts upon which the above questions of law arose. He submitted that the parties could not otherwise take the opinion of the Court upon the correctness of the arbitrator's conclusions, which it was intended they should have an opportunity to do.

But the Court said they thought the arbitrator had acted very judiciously, and that there was no pretence for the application; and that he seemed (very properly) to have had no doubt in his mind upon any of the points of law that had been submitted to him, and which he had stated upon his award. The rule was therefore refused.

The learned Serjeant now moved that the award might be set aside, on the ground of error in point of law in the arbitrator's decision.

Lord Chief Justice TINDAL.—The broad propositions submitted to the arbitrator, and stated upon the award, clearly are not tenable. He has done right; and therefore, there being nothing erroneous on the face of the award, we cannot set it aside.

The rest of the Court concurring—

Rule refused (*a*).

(*a*) See *Perryman* v. *Steggall*, *post*, p. 93.

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The plaintiff took of the defendant a house, at a *yearly* rent, under an agreement by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of *rent*, rates, taxes, or assessments;" and the former agreed, that, "from and after that day, *the same* should be kept paid by him for the period he might occupy the premises." At the expiration of the *first quarter*, the superior landlord distrained for rent:—*Held*, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a *yearly* rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid.

UPTON *v.* FERGUSSON.

THIS was an action on the case brought by the plaintiff to recover from the defendant damages alleged to have resulted to the plaintiff from a supposed breach of an implied duty in the defendant to indemnify the plaintiff, to whom he had agreed to let certain premises, from the consequence of his, the defendant's, failure to pay the rent reserved to the superior landlord.

The declaration contained three counts.—The first count stated, that, before and at the time of the committing of the grievances by the defendant as thereinafter next mentioned, the defendant held and enjoyed certain premises as tenant thereof to one Sarah Brownell, to wit, in the county of Surrey; that, whilst the defendant was such tenant to the said Sarah Brownell, and before and at the time of the committing of the grievances thereinafter next mentioned, to wit, on the 29th of September, 1832, to wit, in the county aforesaid, the plaintiff, at the special instance and request of the defendant, had become and was tenant to the defendant of the said premises with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of 270*l.*; and thereupon it then and there became and was the duty of the defendant, so long as the defendant continued such tenant to the said Sarah Brownell, and so long as the plaintiff continued such tenant to the defendant, and paid the said rent of 270*l.* to the defendant, for him to pay the said first-mentioned rent to the said Sarah Brownell, and to indemnify and save harmless the plaintiff from and against the payment of any of the said rent so payable to the said Sarah Brownell, over and above the amount of the said rent so payable to the defendant as aforesaid, which might be due and in arrear from the plaintiff to the defendant, and from and against any distress, or costs, charges, damages, or expenses

which should or might be made arise or happen to the plaintiff for or by reason of the non-payment thereof: and although the said tenancy of the defendant to the said Sarah Brownell and the said tenancy of the plaintiff to the defendant were and continued for a long time, to wit, until and after the committing of the grievances thereafter next mentioned and hitherto; and although no part of the said rent of 270*l.* had yet become due and payable from the plaintiff to the defendant; yet the defendant, not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud the plaintiff, did not nor would, during the continuance of the said tenancies, pay the said first-mentioned rent to the said Sarah Brownell, or save harmless or indemnify the plaintiff, according to his said duty, but wholly neglected so to do; and by reason thereof, during the continuance of the said tenancies, to wit, on the 9th February, 1833, to wit, in &c., a certain distress was made, by and on the behalf of the said Sarah Brownell, on divers goods and chattels of the plaintiff, to wit, &c. &c., of great value, to wit, of the value of 200*l.*, then in and upon the said premises, for a certain sum of money amounting to the sum of 67*l.* 10*s.*, then due and in arrear from the defendant to the said Sarah Brownell for and in respect of the said rent so payable to her as aforesaid; and the said Sarah Brownell kept and detained the said goods and chattels of the plaintiff under the said distress for a long space of time, to wit, until the 11th day of February, 1833, and until the plaintiff, on &c., in order to regain possession of the said goods and chattels, was forced and obliged to, and did, replevy the same, and was therein and thereby put to a great expense, amounting, to wit, to 20*l.*; and by means of the premises the plaintiff would be forced and obliged to pay to the said Sarah Brownell the said arrears of rent so due and owing to her from the defendant, and the costs and charges of the said distress and incident thereto; and the plaintiff had been and

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was much prejudiced, injured, and damnified by means of the premises, to wit, in &c.

The second count was in substance the same as the first; the third was in trover for the goods and chattels mentioned in the first count. The defendant pleaded the general issue.

At the trial before Lord Chief Justice Tindal, at the last Assizes at Kingston, the facts that appeared in evidence were as follow:—In the month of September last, the defendant, who held the premises in question of Mrs. Sarah Brownell, under a lease or assignment, of which one year and a quarter were then unexpired, entered into the following agreement with the plaintiff:—

"The said John Fergusson agrees to let to the said John Upton all the house and premises No. 54, Strand, late in the occupation of P. P. H. Roberts, at *the yearly rent* of 270*l.*, from the 29th instant, up to which day the said John Fergusson has or will bear, pay, discharge, or allow to the said John Upton any and all arrears of *rent, rents,* rates, taxes, or assessments (if any are left unpaid) to the 29th instant; and that, from and after that day, *the same are to be kept paid by the said John Upton* for the period he may occupy the said house and premises, and which is agreed to be *for the whole of the unexpired term* now to come in a lease of one year and a quarter of another year from Michaelmas day instant, wanting the number of days provided for surrendering as in the said lease contained, &c. &c."

The plaintiff was let into possession of the premises under the above agreement, and, shortly after the expiration of the first quarter, the defendant's landlady, Mrs. Brownell, distrained upon the plaintiff's goods for 67*l.* 10*s.*, for a quarter's rent due to her from the defendant.

His Lordship nonsuited the plaintiff, giving him leave to move to enter a verdict for 10*l.*, the costs he had incurred in replevying, should the Court be of opinion that the agreement above set out imposed upon the defendant the duty of indemnity contended for on the part of the plaintiff.

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Mr. Serjeant *Taddy* now moved accordingly.—Under the agreement in question, no rent would be due from the plaintiff to the defendant until the expiration of a year from the taking; the agreement stipulating for a *yearly* rent. The defendant himself had no right of distress; he by the agreement had parted with the whole of his interest in the premises, and therefore it operated in law as an assignment. The defendant's landlady, Mrs. Brownell, undoubtedly had a right to distrain: but the question is, whether it is not a necessary inference from the defendant's contract with the plaintiff, that he was bound to indemnify him from the claim of Mrs. Brownell. In *Burnett* v. *Lynch* (*a*), it was held that case lies by the assignor against the assignee of a lease assigned by deed-poll, upon his implied duty to perform the covenants in the original lease, although the assignor had by the assignment parted with all his interest: and in *Hancock v. Caffyn* (*b*), where the defendant held premises under a lease from one J. H., at a certain rent; and entered into an agreement with one N. for the sale of all the household furniture, &c., on the premises, for a certain sum, to be paid by instalments—covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the mean time, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted: with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold

(*a*) 8 Dow. & Ryl. 368; S. C. 5 Barn. & Cress. 589.

(*b*) *Ante*, Vol. 1, p. 521.

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the goods of N. The Court held that there was an implied duty in the defendant to indemnify N. from the consequences of the non-performance of his covenants with the superior landlord.

Lord Chief Justice TINDAL.—I thought at the trial, and still think, that the understanding of the parties must have been, that, from the time the plaintiff took the premises, he was to be looked to by the landlady, Mrs. Brownell, for the rent thereafter to become due; and that the defendant was thenceforth to be discharged from all responsibility, he having parted with the whole of his interest in the premises. By the terms of the agreement, the defendant undertakes that, up to the 29th September, the date of the instrument, he "has or will bear, pay, discharge, or allow to the said John Upton any and all arrears of *rent*, *rents*, rates, taxes, or assessments;" and the plaintiff agrees, that, "from and after that day, *the same* are to be kept paid by the said John Upton for the period he may occupy the said house and premises." The agreement gave the plaintiff notice of the lease under which the defendant held the premises; he ought to have inquired into the terms of that lease: had he done so, he would have ascertained that the rent was reserved to be paid quarterly to Mrs. Brownell. As, therefore, the plaintiff has in terms undertaken to keep down the *rent*, I think the nonsuit was right.

Mr. Justice PARK.—I am by no means prepared to say that this was so strictly a *yearly* rent as to prevent the defendant from demanding it in the usual manner. At all events, the plaintiff had notice of the lease under which the defendant held, and he took subject to it. I therefore concur in thinking that the nonsuit should not be set aside.

The rest of the Court concurring—

Rule refused.

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Friday, April 19th.

PERRYMAN *v.* STEGGALL and Another.

THIS was an action upon a promissory note for 108*l.* 14*s.* 8*d.*, made by the defendants as sureties for one Tucker, payable to the order of Messrs. Sylvester & Walker, and by them indorsed to the plaintiff. The cause was originally tried before Mr. Justice Gaselee, at the Sittings in London after Michaelmas Term, 1831. The defence was usury; to prove which Tucker was called. It appearing that Tucker had been a bankrupt, and was uncertificated, and that he had also taken the benefit of the insolvent debtors' act, his testimony was objected to, on the part of the plaintiff, on the ground of incompetency, inasmuch as the defendants, as his sureties, would be entitled to prove the amount of the verdict, if against them, under his commission, by virtue of the 52nd section of the statute 6 Geo. 4, c. 16. The defendants then executed a general release to Tucker; but it was objected that this release did not render him competent, it being a mere personal release, leaving his estate in the hands of the assignees still liable to the defendants' proof. Tucker's evidence was admitted, subject to a motion, and a verdict was found for the defendants. In Easter Term last (*a*), the Court directed a new trial, on the ground that Tucker was not an admissible witness, his estate being liable to the defendants' proof in the event of a verdict passing against them. Lord Chief Justice Tindal on that occasion said: "The bankrupt might have released his interest in the surplus of his estate. If he had done so, he might have been admissible as far as concerns the bankruptcy. *It is not necessary to say anything as to the effect of his discharge under the insolvent debtors' act.*"

When the cause went down for trial again, it was refer-

Where a cause is referred to a layman, and he assumes to decide upon a point of law, and errs, the Court will set aside his award: but, where the arbitrator is a barrister, both the law and the fact are left to his discretion; even though a question of law arise incidentally on the hearing, which could not therefore have been in the contemplation of the parties at the time of referring.

(*a*) *Ante*, Vol. 1, p. 540.

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red generally to the arbitration of a barrister. The arbitrator admitted Tucker's evidence. He had then released his interest in the surplus of his estate under the bankruptcy; but he stood in the same situation that he did on the former occasion as to his insolvency. A second verdict having been directed to be entered for the defendants—

Mr. Serjeant *Wilde* moved that the award might be set aside, on the ground that the arbitrator had improperly received the evidence of Tucker.

Mr. Justice ALDERSON having suggested that, although the Courts will allow an award to be opened where the reference is to a layman, and he has assumed to decide upon a point of law, and has erred; yet that, where the reference was to one skilled in the law, they would not do so—

Mr. Serjeant *Wilde* obtained leave to postpone his motion in order to look into the authorities.—He now cited the following:—*Wade* v. *Huntley* (*a*) where it is said, that, "if a mistake in point of law be made out by clear evidence on one side, which is not denied by the other, the Court will set aside the award; and a mistake in the judgment of the arbitrator is considered as a mistake in point of law." *Wohlenberg* v. *Lageman* (*b*), where Lord Chief Justice Gibbs said (*c*): "If an arbitrator acts directly against law, the Court will set aside the award; but if, in a matter mixed of law and fact, he mistakes some of the points, they will not therefore set aside an award—*Delver* v. *Barnes* (*d*)." *Chace* v. *Westmore* (*e*), where a cause involving a question of law was referred to a barrister, and this question did not appear on his award, the Court refused to open the award

(*a*) Tidd's Practice, 9th. edit. p. 841.

(*b*) 6 Taunt. 254; S. C. 1 Marsh. 579.

(*c*) 6 Taunt. 25.

(*d*) 1 Taunt. 48.

(*e*) 13 East, 357.

again on a suggestion of the barrister's mistake on the point of law, *considering it the intention of the parties to refer questions of fact as well as of law.* Lord Ellenborough there said: "I fear it is impossible to lay down any general and certain rule upon this subject, in what cases the Court will not suffer an award to be opened: it must be subject to some degree of uncertainty, depending upon the circumstances of each case. But it is enough to say, that, in the present case, where the merits in law and in fact were referred to a person competent to decide upon both, we will not open the award, unless it could be shewn to be so notoriously against justice and his duty as an arbitrator, that we could infer misconduct on his part:" and Mr. Justice Le Blanc added, "that, where the question of law necessarily arises upon the face of the award, there the Court must take notice of it." *Richardson* v. *Nourse* (*a*), where the captain of a ship, at an intermediate port, in order to pay for repairs, had necessarily sold part of the cargo, at a price higher than it would have fetched at the port of destination, and, upon a reference to settle the average loss between the ship-owner and charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination—the Court refused to set aside the award. Lord Chief Justice Abbott there said: "I do not go the length of saying, that, where arbitrators proceed upon a mistake of a clear principle of law, the Court will not set aside their award. But I cannot, in this case, say that the arbitrators have decided contrary to any clear, well-established principle of law." *Young* v. *Walter* (*b*), where it was held, that though, if an arbitrator, under a general reference, meaning to decide according to law, mistakes, *the Court will set that right*, yet, if the parties choose to refer matters of law, meaning to have

(*a*) 3 Barn. & Ald. 237. (*b*) 9 Vesey, 364.

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the judgment of the arbitrator upon them, instead of that of the Court, the award, though not agreeable to law, cannot be therefore impeached. Lord Eldon there said: "The Court of King's Bench have lately (*a*) quarrelled with a decision of Lord Rosslyn, followed by me (*b*), upon this point. I confess I think those decisions right. If there is a question of law, and the parties choose to refer that to the decision of the arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But, if a distinct question of law, and nothing else, is referred, as there was in the case before Lord Rosslyn, and the parties choose to say they will not take the decision of the Court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree? The question is, whether, by the reference to arbitration, they mean to make the arbitrator *pro hâc vice* the lawgiver between them." *The Attorney General* v. *Davison* (*c*), where by an act of parliament commissioners were appointed to investigate certain public accounts, and they were authorized to summon witnesses and to examine them upon oath: the commissioners examined witnesses, and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected by the proceedings, but who had no opportunity of being present at the examination, or of cross-examining the witnesses: on a subsequent reference to arbitration of these accounts, the Court held that the arbitrator could not receive as evidence the depositions taken before the commissioners. Lord Chief Baron Alexander said: "I have always understood that ar-

(*a*) *Kent* v. *Elstob*, 3 East, 18. (*b*) *Ching* v. *Ching*, 6 Vesey, 282.
(*c*) 1 M'Clel. & Younge, 160.

bitrators are bound by the same rules of evidence as the Courts of law; though I believe that arbitrators, especially when not professional men, frequently proceed on grounds not recognized by the Courts." And Mr. Baron Hullock: "I never understood that arbitrators were at liberty to deviate from those rules which govern the superior Courts. It is true, that, at *Nisi Prius*, on orders of reference, and where, generally speaking, all matters in dispute are referred, the arbitrator is usually authorized to examine the parties, or either of them, if he thinks proper; but this depends on the previous agreement of the parties, who by consent introduce it into the order of reference."

The learned Serjeant observed, that the point seemed to be involved in some obscurity, but that the result of the authorities appeared to be this—that the parties are concluded by the arbitrator's decision upon a point of law that it was their intention to submit to his judgment; but not where he takes upon himself to decide upon a point of law arising incidentally (as in this case) in the course of the reference, and which could not have been anticipated, and upon which, therefore, it could not have been intended by the parties that the arbitrator should be substituted for the Court.

[Mr. Serjeant Talfourd mentioned a case in which the Court of King's Bench had lately negatived a similar application.]

Lord Chief Justice TINDAL.—I have always understood it to be settled, that, where a lawyer is appointed arbitrator, he is constituted by the parties judge of the law as well as of the facts. I therefore think we have no right on this occasion to call in question the propriety of the decision of the individual whom the parties have thought proper to substitute for the Court and jury.

Mr. Justice ALDERSON.—The question as to the ad-

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missibility of Tucker as a witness was certainly a fit one for discussion; but I think we are not at liberty to enter into that discussion now.

Mr. Justice GASELEE.—I am of the same opinion. There is the less reason in this case for opening the award, since the arbitrator, in receiving the evidence of Tucker, has acted upon a principle that the Courts have of late inclined to adopt, viz. to apply objections to the credit rather than to the competency of the witness.

Rule refused (*a*).

(*a*) See *Jay* v. *Byles*, ante, p. 86.

Friday, April 19*th.*

MARSHALL v. THOMAS.

It is no ground of special demurrer that the plaintiff omits to describe the nature of the action at the commencement of the declaration, pursuant to the rule of Michaelmas Term, 1654.

THIS was an action of assumpsit upon a charter-party. The declaration commenced as follows:—

"Lancashire (to wit). John William Marshall (the plaintiff in this suit) complains of John Wood Thomas (the defendant in this suit), who has been summoned to answer the said plaintiff—For that whereas, &c."

By the terms of a charter-party it was stipulated that the freight should be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date."

By the terms of the charter-party, the freight was to be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date." The first count of the declaration, after setting out the charter-party, the shipment under it, and the amount of freight, proceeded as follows: "Of all which premises the defendant then and there had notice, and was then and there requested by the plaintiff

In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charter-party:"—*Held* sufficient, on special demurrer

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to pay the said sum of 940*l.* 0*s.* 7*d.* in the manner in the said charter-party mentioned, to wit, in &c.; Yet the defendant had not yet paid to the plaintiff the said last-mentioned sum of money, or any part thereof, but to pay the same or any part thereof to the plaintiff, *according to the terms of the said charter-party*, or in any other manner, the defendant had hitherto wholly refused, and still did refuse, &c." The second count was similar.

The defendant demurred specially—as to the commencement of the declaration—"For that every declaration, in the commencement thereof, should state and shew, for the information of the Court and the defendant, in a concise way, the form of the action, whether it be in an action on promises or otherwise; nevertheless the said declaration does not in the commencement thereof in any way shew the form of the action, nor does it, as it ought to do, shew in what plea the defendant was summoned to answer the plaintiff as therein stated:" and, as to the first count—"That, in and by the charter-party in the said first count mentioned, the freight was to be paid, one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date: nevertheless, in stating a breach of the non-payment by the defendant of that freight, the plaintiff hath not positively and with sufficient certainty averred that the defendant ever refused or neglected to pay the same by such bills, but hath merely alleged that the defendant hath not paid the said freight according to the terms of the said charter-party, or in any other manner; and which mode of stating the breach is too general, indefinite, and uncertain: And also for that it is not in or by the said first count stated or alleged that the plaintiff ever tendered to the defendant any bill of exchange for the payment of the said freight, or that the plaintiff ever requested the defendant to pay the same by bills." There was a similar demurrer to the second count. The plaintiff joined in demurrer.

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The case now came on for argument.

Mr. Serjeant *Wilde*, in support of the demurrer.—In the commencement of his declaration the plaintiff has departed from the known course of pleading. By a rule of Court of Michaelmas Term, 1654, "For avoiding of long and unnecessary repetitions of the original writ in actions upon the case, and personal actions upon penal statutes," it is ordered, "That declarations in actions of trespass upon the case, or personal actions upon any general statute, &c., and such like, other than debt, repeat not the original writ, but only the nature of the action, viz. A. B. was attached to answer C. D. in a plea of trespass upon the case," &c. That rule has been acted upon ever since. In the present case the declaration has departed from the course there pointed out, and is therefore bad on special demurrer.—Where, by the terms of a contract, several things are required to be done, it is the duty of the party alleging a breach of that contract, to negative the performance of each in terms. Here, by the charter-party, the freight was to be paid in two different modes, viz. one third on the ship's arrival, and the remainder on delivery of the cargo, by good and approved bills at four months' date. The plaintiff ought to have negatived the payment in either of the modes pointed out.

Mr Serjeant *Stephen, contrà*, was stopped by the Court.

Lord Chief Justice TINDAL.—The rule of 1654 which required the writ to be shortly set out at the commencement of the declaration, was a mere rule of Court, the disobedience to which is not to be visited like the breach of a positive law. The form of the commencement used in this case is not bad according to the law of the land. With regard to the general breach assigned in the first and second counts, viz. that the defendant had not paid

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the freight "according to the terms of the charter-party," I think that statement sufficient.

The rest of the Court concurring—

Judgment for the plaintiff.

BANBURY, Plaintiff, HARPER and Wife, Deforciants.

Saturday, April 20th.

Where in levying two fines between the same parties, the one *sur concessit*, the other *sur cognizance de droit*, the parcels had by mistake been transposed, the Court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses.

BY an indenture of lease and release of the 30th April, 1829, and made between the deforciants, of the one part, and William Banbury of the other part, it was agreed that two several fines should be levied of certain hereditaments and premises therein respectively described—the one a fine *sur concesserunt* to comprise certain hereditaments at Knightcote and Northend—the other a fine *sur cognizance de droit come ceo &c.* to comprise certain hereditaments at Napton-on-the-Hill, and Long Ilchington. Two fines were levied in Easter Term, 10 Geo. 4; but, by the mistake of the solicitor employed on that occasion, the premises that were intended to be comprised in the fine *sur concesserunt* were inserted in the fine *sur cognizance de droit*, and *vice versâ*. Upon affidavits detailing these facts; that such mistake was but lately discovered; that the transposition of the parcels in the said fines was unintentional; and that the intention of the parties as expressed in the deed was not thereby carried into effect—

Mr. Serjeant *Peake* moved that the two fines might be amended, and made conformable with the deed to lead the uses. He referred to the case of *Shoul*, plaintiff, *Brookes* and Others, deforciants (*a*), where the form of the *præcipe*

(*a*) MS. Trinity Term, 1829.

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BANBURY Plaintiff, HARPER Deforciant.

and concord was that of a fine *sur concessit* instead of a fine *sur cognizance de droit come ceo &c.*, and the Court allowed it to be amended.

PER CURIAM.—It seems to have been a mere mistake in the description of the parcels.

Fiat (*b*).

(*b*) See *Prideaux* v. *Gifford*, 1 Marsh. 422; S. C. 6 Taunt. 21.

Saturday, April 20th.

APPERLEY, Clerk, *v.* The Bishop of HEREFORD.

In *quare impedit*, the count stated that the plaintiff was admitted, &c., into the rectory of S. L., and, so being incumbent of the said church, afterwards accepted and was admitted, &c., into the vicarage of O. P., the said vicarage and the said rectory being respectively each of them a benefice with cure of souls; whereby it then and there belonged to the plaintiff as patron to present to the church of S. L.; and that he did present

THIS was a *quare impedit*, brought against the defendant for not permitting the plaintiff to present to the rectory of Stoke Lacy, in the county of Hereford, which was vacant, and in the gift of the plaintiff.

The count stated, that one Thomas Griffith, now deceased, was, in his lifetime, to wit, on &c., seised of the advowson of the said rectory, as in gross by itself, as of fee and right, and, being so seised thereof as aforesaid, he the said T. Griffith, afterwards, to wit, on &c. aforesaid, in &c. aforesaid, presented to the said church (being then vacant) one John Lilly, his clerk, who, on the presentation of the said T. Griffith, was admitted, instituted, and inducted into the same, in the time of peace, &c., to wit &c.; and the said T. Griffith being so seised as aforesaid, and the said church being full of the said J. Lilly, the incumbent thereof, the said T. Griffith afterwards, to wit, on the 20th January,

to the late bishop one W. B., a fit person in that behalf, but the bishop refused to admit him. The defendant (the bishop) pleaded, that, before the church of S. L. became vacant after the plaintiff accepted, and was admitted, &c., into the vicarage of O. P. as in the declaration mentioned, and before the plaintiff presented the said W. B. in the declaration mentioned, the plaintiff conveyed to one J. H. the advowson, &c., of S. L.:—*Held*,—*first*, that the plea was bad on demurrer, for that it was not competent to the bishop to dispute the title of the patron, at least before collation—*secondly*, that, to avoid the first living, it was not necessary that it should appear on the face of the count that it was of the value of 8*l.* a year or more in the king's books—*thirdly*, that, the patron being himself the incumbent, no sentence of deprivation was necessary to render the first living void.

1798, in &c., duly made and published his last will and testament in writing, &c., and thereby gave, devised, and bequeathed unto the said J. Lilly, his heirs and assigns, all his manors, messuages, farms, lands, advowsons, tithes, tenements, hereditaments, and real estate, whatsoever and wheresoever, to the uses, upon the trusts, and for the intents and purposes thereinafter limited, expressed, and declared of and concerning the same, that is to say, upon trust to pay a rent-charge of 5*l.* a year to J. P., and, subject to the same rent-charge, upon trust, during the natural life of the wife of the said T. Griffith, from time to time to receive the rents and profits thereof as the same should become due and payable, and to pay and apply the money arising therefrom, after all just deductions and allowances, unto his said wife and her assigns during the term of her natural life, and, from and after her decease, to the use and behoof of the said John Lilly, his heirs, executors, administrators, and assigns, subject to and charged with the payments in the said will in that behalf mentioned; and afterwards, the said church being full of the said John Lilly, the incumbent thereof, the said T. Griffith died so seised as aforesaid, without altering his said will as to the said devise, to wit, on the 1st January, 1800, in &c. aforesaid, and the said wife of the said T. Griffith in the said will named also died, to wit, on &c. aforesaid, at &c. aforesaid; and the said John Lilly, by virtue of the said devise, then and there became and was seised of the said advowson of the said rectory, as in gross by itself, as of fee and right; and the said John Lilly, being so seised as aforesaid, afterwards, to wit, on the 24th June, 1811, in &c. aforesaid (the said church being full of the said John Lilly, the incumbent thereof as aforesaid), by a certain indenture of bargain and sale then and there made between the said John Lilly of the one part, and the plaintiff of the other part [profert], for the consideration therein mentioned, bargained and sold to the plaintiff the said advowson of the rec-

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tory aforesaid, with the rights, members, and appurtenances thereto belonging [*habendum* for one year thence next ensuing]; by virtue whereof, and, by force of the statute made for transferring uses into possession, the plaintiff was possessed of the said advowson for the said term; and, being so possessed thereof, and the reversion thereof belonging to the said John Lilly, and the said church being full of the said John Lilly, the incumbent thereof as aforesaid, he the said John Lilly afterwards, to wit, on the 25th June, 1811 aforesaid, in &c. aforesaid, by a certain other indenture then and there made between the said John Lilly of the first part, Thomas Apperley the elder of the second part, and the plaintiff of the third part [profert], granted and released to the plaintiff and his heirs the reversion of the said advowson of the rectory aforesaid, with the rights, members, and appurtenances thereto belonging, to have and to hold the same unto the plaintiff, his heirs and assigns, for ever; by virtue whereof, he, the plaintiff, then and there became and was seised of the said advowson, as in gross by itself, as of fee and right; and the plaintiff being so seised of the said advowson, the said John Lilly, being so incumbent of the said church of Stoke Lacy as aforesaid, afterwards, to wit, on the 23rd August, 1811 aforesaid, in &c. aforesaid, accepted, and was then and there admitted, instituted, and inducted into the chapelry of Bartestry, in the parish of Darmington, in the said county, the same chapelry and the said rectory of Stoke Lacy being respectively each of them then and from thenceforth a benefice with cure of souls, whereby it then and there belonged to the plaintiff, patron as aforesaid for the time being, to present a fit person, or to pray to be himself admitted, he being a fit person, to the said church of Stoke Lacy; and thereupon the plaintiff, patron as aforesaid for the time being, then and there offered himself as clerk, and prayed to be admitted to the said church of Stoke Lacy; for that he the plaintiff could not present himself; and he, the plaintiff,

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being then and there a fit person in that behalf, on such his offer and prayer, was admitted, instituted, and inducted into the same church, in the time of peace, &c., to wit, on the day and year last aforesaid: and the plaintiff being so seised of the said advowson as aforesaid, and being incumbent of the said church of Stoke Lacy as aforesaid, afterwards, to wit, on the 26th January, 1832, in &c. aforesaid, accepted, and was then and there admitted, instituted, and inducted into the vicarage of the parish church of Ocle Pritchard, in the county aforesaid, the said vicarage, and the said rectory being respectively each of them then and from thenceforth hitherto, a benefice with cure of souls; whereby it then and there belonged to the plaintiff, patron as aforesaid for the time being, to present a fit person to the said church of Stoke Lacy: and the plaintiff, so being patron as aforesaid for the time being, afterwards, to wit, on &c. last aforesaid, in &c. aforesaid, did present to George Isaac, then Lord Bishop of Hereford, now deceased, then being the proper ordinary in that behalf, one W. Betham, clerk, to be admitted, instituted, and inducted into the said church of Stoke Lacy, the said W. Betham then and there being a fit person in that behalf; but the same bishop then and there unjustly refused so to admit, institute, and induct the said W. Betham, whereby it still belongs to the plaintiff, patron as aforesaid for the time being, to present a fit person to the said church, now being vacant by reason of the premises, but the said bishop, the defendant, will not permit him so to do, but unjustly hinders him from so doing, &c.

The defendant pleaded—first, that, before the said church of Stoke Lacy became and was vacant after the plaintiff accepted, and was admitted, instituted, and inducted into the vicarage of the parish of Ocle Pritchard, as in the declaration mentioned, and before the plaintiff presented the said W. Betham in the declaration mentioned, or any other person in that behalf, to wit, on the

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25th August, 1826, in &c. aforesaid, by a certain indenture then and there made between the plaintiff of the one part, and J. Holbrook of the other part [profert], the plaintiff, for the due considerations therein mentioned, did bargain and sell to the said J. Holbrook, his executors, administrators, and assigns, among other things, all that the said advowson, right of nomination, presentation, collation, donation, patronage, and free disposition, of, in, and to all that rectory, vicarage, parsonage, or parish church of Stoke Lacy, in the said county of Hereford [*habendum* to Holbrook, for one year thence next ensuing]; by virtue whereof, and by force of the statute made for transfering uses into possession, the said J. Holbrook was possessed of the said advowson, &c., for the said term; and, being so possessed thereof, and the said reversion thereof belonging to the plaintiff, and the church of Stoke Lacy being full of the plaintiff as aforesaid, the incumbent thereof, the plaintiff afterwards, to wit, on the 26th August, 1826, in &c. aforesaid, by a certain other indenture then and there made between the plaintiff of the one part, and the said J. Holbrook of the other part [profert], the plaintiff, for the consideration therein mentioned, granted and released to the said J. Holbrook, and to his heirs and assigns, the reversion of and in the said advowson, right of nomination, presentation, collation, donation, patronage and free disposition, of, in, and to all that the said rectory, vicarage, parsonage, or parish church of Stoke Lacy aforesaid, in the county aforesaid, &c., and all other rights, privileges, and appurtenances thereto belonging [*habendum* to J. Holbrook, his heirs and assigns, upon the trusts therein declared]; by virtue whereof the said J. Holbrook then and there became and was seised of the said advowson, &c., as of fee and right, &c.

The second plea stated, that the plaintiff having then and there one benefice with the cure of souls, to wit the said church of Stoke Lacy in the declaration mentioned,

being then and there of the yearly value of 8*l.* and upwards, according to the form of the statute in such case made and provided, did accept and take, and was admitted, instituted, and inducted into the vicarage of the parish church of Ocle Pritchard, as in the declaration mentioned, being also a benefice with cure of souls, and the plaintiff then and there became and was possessed of the same, whereby then and immediately after such possession had thereof, the first benefice, to wit, the said church of Stoke Lacy, was adjudged in the law to be, and was void; and that six months after the avoidance of the said church of Stoke Lacy, and after the said possession of the said vicarage, elapsed before the said W. Betham, or any other person in that behalf, was presented by the plaintiff: and this &c.—The third plea was similar, but more general.

To the first plea, the plaintiff replied, that the said indentures in the same plea mentioned were made and sealed after and not before the plaintiff accepted and was admitted, instituted, and inducted into the said vicarage of the parish church of Ocle Pritchard *modo et formâ;* and demurred to the second and third. The defendant joined in demurrer, and also demurred to the replication.

The case now came on for argument.

Mr. Serjeant *Stephen*, for the plaintiff.—The second and third pleas are clearly bad, as they do not allege any collation. All the pleas are pleas to the title to the patronage, which by the known rule of law the ordinary cannot plead unless he has collated—Comyns's Digest (*a*). In bar to a *quare impedit* the bishop may plead that he claims nothing but as ordinary. At common law, the incumbent or bishop shall not plead to the right of patronage; for every one ought to plead apt matter; and he has nothing in the patronage (*b*). But, by the statute 25 Edw. 3, st. 3, c. 7, to avoid

(*a*) Title "Pleader," (3 I. 9.). (*b*) 7 Co. 26 a; Hob 318; W. Jones, 5.

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feint pleading in the patron, an archbishop or bishop who collates by lapse may make title to the patronage in a *quare impedit* brought by the king, or a common person. But an ordinary who has not collated by lapse cannot plead to the right since the statute 25 Edw. 3, any more than by the common law (*a*). In *Elvis* v. *The Archbishop of York* (*b*), the declaration stated that Sir Gervas Elvis was seised of the manor of Sanby to which the advowson was appendant in fee, and held the same of the king, and, so seised, presented one George Turpin, who was admitted and instituted &c.; that Sir Gervas, so seised, was attainted of felony, and executed; by force whereof, the king was seised of the said manor, and granted the manor and advowson to the plaintiff and his heirs; by virtue whereof he entered and was seised thereof in fee; and, so being seised, the church became void by the death of Turpin, whereby it belonged to the plaintiff to present. The archbishop pleaded that the king, being so seised, the church being void by the death of Turpin, the king presented to the archbishop T. B., whom he caused to be admitted &c.; *absque hoc* that the king granted to the plaintiff, *prout*, &c. On demurrer, it was held that the plea of the archbishop to counterplead the title of the plaintiff to the patronage was not good; that, at common law, "the ordinary, having collated by lapse, could not plead the title of the patronage to maintain it (as by the statute appears); much less could he do it before the lapse incurred." "I hold," says Lord Chief Justice Hobart, "plainly that he can no otherwise plead than he could at the common law, but only where he hath collated actually by lapse." The Court agreed *und voce.*

A conveyance of the advowson does not pass a void turn. Watson, 94. By the fourth or great council of Lateran (*c*), it is declared that (*d*), "*quicunq; reciper' aliquod benefic' habens cur' animar' annex', si prius tale benefic' obtinebat,*

(*a*) Hob. 319; W. Jones, 5. Com. Dig. title "Pleader" (3 I.).
(*b*) Hob. 315.
(*c*) 28th Canon.
(*d*) See 4 Rep. 79 a; 2 Wils. 184.

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eo sit jure ipso privatus; et si forte illud retinere contenderit, alio etiam spolietur. Is quoque ad quem prioris spectat donatio, illud post receptation' alterius conferat cui merito viderit conferend'." And by the same canont, after six months the bishop may present to the first living (*a*). But it is said, that the church was not void, but voidable only; and that the patron had it in his power to make it void or not. The word "voidable" in this case must necessarily mean that the church may be made void by act or judgment of law in a proper Court, and not by any act *in pais* by the patron; for it is laid down by Lord Coke (*b*), that, before a presentation can be made to a church, it must be actually void; its being voidable only is not sufficient: and he cites *Smale's* case (*c*)—"*L'esglise doit estre void devant poet presenter, car, si l'esglise soit voidable, nul presentation poet estre; mes, si soit void en facto autrement est.*" In *Shute* v. *Higden* (*d*) it is said "It hath been resolved in *Holland's* case (*e*), and likewise in *Digby's* case (*f*), and often before, since the council of Lateran, A.D. 1215, that, if a man have a benefice with cure, whatever the value be, and is admitted and instituted into another benefice with cure, of what value soever, having no dispensation or qualification, the first benefice is *ipso facto* so void that the patron may present another to it if he will. But if the patron will not present, then, if under the value, no lapse shall incur until deprivation of the first benefice, and notice; but, if of the value of 8*l.* or above, the patron at his peril must present within six months, by 21 Hen. 8." It certainly is not shewn in the present case, either upon the declaration or the pleas, that the first benefice was above the value of 8*l.* If the fact be relied on by the defendant, he should have shewn on his pleas that it was under that value.

The right to present to a void church is a fruit fallen, or,

(*a*) 2 Wils. 184.
(*b*) 1 Roll. Rep. 213.
(*c*) 17 Edw. 3, 59.
(*d*) Vaughan, 129.
(*e*) 4 Rep. 75 a.
(*f*) 4 Rep. 78 b.

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as it is sometimes called, a chattel vested and severed from the advowson. In *The Bishop of Lincoln* v. *Wolferstan* (*a*), the Court were clear "that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant *quoad* the fallen vacancy (though good as to the advowson, unless it be a corrupt purchase)." In Watson's Complete Incumbent (*b*) it is laid down, that, "though a grant of a void turn made by a common person is void, yet it is good when the king is grantor. But not even then, unless he mention it in his grant." In *Stephens* v. *Wall* (*c*), *per* Harper, Weston, and Dyer "*tenu q; le graunt del present avoidance est voyde; pur ceo que il est un mere personal chose annex al person cestuy que fuit patron in expectancy ad tempus vacationis. Et auxy chose in droit, power, et authoritie; et auxy chose en action, et en effect le fruit et execution del advowson, et nemy ascun advowson.*" In *Baker* v. *Rogers* (*d*), a stranger contracted with the patron for the grant of a presentation after the church was void, and presented a person not privy to the contract; the grant was held void, as being of a chose in action; but it was held that the presentation should not therefore be avoided as an *usurper*, but as *simoniace promotus* (*e*).

Mr. Serjeant *Ludlow*, *contrà*.—Upon reference to the authorities, it will be found that the rule that a bishop or ordinary shall not be permitted to counterplead the title of the patron, is qualified—*Elvis* v. *The Archbishop of York* (*f*). Salkeld, title "*Quare Impedit*" (*g*). The substance of the allegation in the first plea in this case is, that, before the avoidance of Stoke Lacy, the plaintiff had conveyed away the property out of which the right of presen-

(*a*) 2 Wils. 171; 1 Sir W. Blac. 490; 3 Burr. 1504.
(*b*) Page 95. And see *Anonymous*, Hobart, 140.
(*c*) Dyer, 283 a.
(*d*) Cro. Eliz. 788.
(*e*) And see Dyer, 129 b.
(*f*) Hobart, 315.
(*g*) 3 Salk. 293.

tation accrued; in other words, that his title to present was determined. The replication, instead of traversing the making of the conveyance, alleges that it was made and sealed *after* the avoidance. Besides, the allegation in the count is of a presentment of Betham to the *late* bishop. How, then, is the present defendant a disturber? It appears from the whole of the record that a lapse had occurred. The right to present therefore passed to the late bishop; and, he dying without having taken advantage of the lapse, the right passed to the crown.

The main question, however, is, whether or not the plaintiff has sufficiently alleged title in himself. The action is in its nature possessory: the plaintiff is to recover by the strength of his own title; he is bound to shew a good title *in omnibus*. It was necessary for him to shew, not only that the church was vacant, but the particular manner of the happening of the vacancy—whether by the death, resignation, or cession of the former incumbent. He has here assumed to set out a vacancy by cession. The question, then, is, whether, without an allegation that the first living was of the value of 8*l.* in the king's books, the acceptance of the second rendered the first living void, or voidable only. The value of the first living is not stated in the count. Though void, therefore, by the canon law, it is not, for any thing that appears, void by the common law, unless so declared by a decree or sentence of the Ecclesiastical Court. In Watson, it is said (*a*): "A church preferment is said to be void by cession, when the incumbent thereof doth take a second benefice that is incompatible. And, first, if an incumbent of a benefice with cure of souls doth take a benefice with cure (*b*); in which case his first benefice was either of less or greater value than 8*l. per annum*; if of less value, yet by his acceptance of a second with cure it is at this day *in jure* void by the received canon

(*a*) Watson's Clerg. Law, c. 2, p. 5. (*b*) *Digby's* case, 4 Rep. 79 a.

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law (*a*). And there needs not any sentence declaratory in the Spiritual Court, to make way for the patron's presentation; for, he may immediately thereupon (without either deprivation or resignation) present a new incumbent to the said church, and require his admission. And if the bishop doth refuse the patron's clerk, a *quare impedit* lies for the patron; yet there ought to be a sentence declaratory of the deprivation in the Court Christian, that notice may be given thereof." By the statute 21 Hen. 8, c. 13, s. 9, it is enacted, that, if any person having a benefice with cure of souls, of the yearly value of 8*l.* or more (in the king's books), accept, and be instituted and inducted in possession of any other benefice with cure of souls, then, immediately after such possession had, the first benefice "shall be adjudged in the law to be void:" and by section 10, it shall be lawful to the patron to present another, and the presentee to have the benefit of the advowson in like manner as though the incumbent had died or resigned. In *Halton* v. *Cove* (*b*), the defendant, being incumbent of a living with cure of souls, *valued at less than* 8*l.* a year in the king's books, accepted another benefice without having a dispensation to hold both, whereby the first became void *de jure;* but he continued in possession. The patron presented another clerk, and afterwards brought *quare impedit* and recovered against the defendant; upon which the new presentee was instituted and inducted. In an action by the latter against the defendant, founded on the 28 Hen. 8, c. 13, s. 3, which gives the profits of every benefice *during vacation* to the next incumbent—it was held that the plaintiff could not recover the profits, either from the time of his being presented, or from the suing out of the *quare impedit;* the vacation contemplated by the statute being a vacation *de facto*. The substance and result of that case is, that the accep-

(*a*) *Evans* and *Ascough's* case, Latch, 243.

(*b*) 1 Barn. & Adolph. 538.

tance of a second living, if the first be above the yearly value of 8*l.*, is *ipso facto* void; but that, if the first living be under the value of 8*l.* a year, then it is void by the canon law, and voidable only at common law, not absolutely void until declared so by the sentence of a Court Christian.

Mr. Serjeant *Stephen*, in reply, was stopped by the Court.

Lord Chief Justice TINDAL.—This was an action of *quare impedit*, brought by the patron of the living of Stoke Lacy, in the county of Hereford, against the Bishop of Hereford, for disturbing him in his right of presentation. The mode in which the plaintiff has stated the avoidance of the turn is this, that the plaintiff was admitted, instituted, and inducted into the church of Stoke Lacy, and, so being incumbent of the said church of Stoke Lacy, afterwards, to wit, on &c., accepted, and was then and there admitted, instituted, and inducted into the vicarage of the parish church of Ocle Pritchard, the said vicarage and the said rectory being respectively each of them then and from thenceforth hitherto a benefice with cure of souls; whereby it then and there belonged to the plaintiff as patron to present a fit person to the church of Stoke Lacy; and he further alleges that he did present to the late bishop one W. Betham, a fit person in that behalf, but the same bishop unjustly refused so to admit, institute, or induct the said W. Betham, whereby it still belonged to the plaintiff to present, but the defendant would not permit him so to do. In answer thereto the bishop pleads, that, before the church of Stoke Lacy became vacant after the plaintiff accepted, and was admitted, instituted, and inducted into the vicarage of the parish of Ocle Pritchard, as in the declaration mentioned, and before the plaintiff presented the said W. Betham in the declaration mentioned, or any other person in that behalf, the plaintiff conveyed to one J. Holbrook the advowson, &c., of Stoke Lacy: in other words,

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that the void turn passed by the conveyance, and therefore that the plaintiff had no title to present. Two other pleas were pleaded, which, in substance, stated, that, before the plaintiff presented, the church of Stoke Lacy was void, and the right of presentation gone from the plaintiff by lapse. With respect to the two last pleas, it is admitted that they cannot be supported: for, it is clear that (as against the bishop at least) the patron may at any time present, notwithstanding six months have elapsed, provided the lapse has not been taken advantage of.

The case of *Elvis* v. *The Archbishop of York* seems to me to be quite decisive of the present: the facts of the two cases appear to be almost identical. It is there laid down that it never shall be permitted that two persons shall dispute concerning the title of a third, in the absence of such third person. In the present case the defendant, the bishop, does assume to dispute as to the title of a third person to this living. I find the law upon this subject clearly laid down. It amounts to this—that, before the statute *de clero*, 25 Edw. 3, st. 3, c. 7, the bishop could not in any case dispute the title of the patron to present. That statute provides, "that, when archbishops, bishops, or other ordinaries, have given a benefice of right devolute to him by lapse of time, and after the king presenteth and taketh the suit against the patron, which percase will suffer that the king shall recover without action tried, in deceit of the ordinary, or the possessor of the said benefices, that, in such case, and all other cases like, where the king's right is not tried, the archbishop or bishop, ordinary or possessor, shall be received to counterplead the title taken for the king, and to have his answer, and to shew and defend his right upon the matter, although that he claim nothing in the patronage in the case aforesaid." The equity of that statute has been held to extend to any other person claiming a right to present. Now, this is not a case in which any collation has been made; and there-

fore that statute does not help the defendant. In *Elvis* v. *The Archbishop of York*, Lord Chief Justice Hobart says (*a*): "For the common law, it was plain that neither ordinary as ordinary, neither before collation or after, nor incumbent, either of his collation nor of the presentation of any other, could plead to the title of the patronage, whereof the reason was pregnant, because neither of them had interest in the patronage, and therefore could not dispute that with which they had nothing to do; which is the reason that his collation by lapse (or before the lapse incurred, though it be a wrong) doth not displace the patronage, but shall be said to be done in the right of the very patron, being nothing but institution and induction, which are his office as ordinary, as well upon presentation as without, though he doth them out of season. And though this seemeth, and was indeed, very mischievous, yet the law would not let in a thing so absurd, and against the law of nature and reason, as to admit two to dispute the interest of a third." This affords an answer to the first branch of the argument urged on the part of the defendant. But it has been further contended, that, on the face of the count, no title to present is shewn in the plaintiff; that it is only shewn that the plaintiff, being incumbent of the church of Stoke Lacy, afterwards accepted and was admitted, instituted, and inducted into the vicarage of Ocle Pritchard, the said vicarage and the said rectory being respectively each of them a benefice with cure of souls; but that it is not alleged that the rectory of Stoke Lacy was also of the yearly value of 8*l.* in the king's books; and that, by the acceptance of a second incompatible benefice with cure, the first living is void only under the canon law, and not void at common law, until sentence of deprivation by the proper ecclesiastical Court. Up to the time of the statute 25 Hen. 8, c. 11, all the canons were considered as part of the com-

(*a*) Hob. 316.

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mon law: and, from all the authorities, it seems to be clear that the only necessity of a sentence of deprivation was, to give notice to the patron. The reason therefore does not apply to a case where the patron himself is the person who has accepted the second living. In the first resolution in *Holland's* case (*a*), it is laid down by Lord Coke, "that, before the statute of 21 Hen. 8, c. 13, if one had a benefice with cure, and accepted another benefice with cure, the first benefice was void; but it was not an avoidance by the common law, but by the constitution of the pope, of which avoidance the patron might take notice if he would, and might present if he would without any deprivation: but, because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would; so that, for the benefit of the patron, the church is void in the principal case, but not for his disadvantage." Upon the whole, it appears to me that enough is stated upon the face of the count to shew the church of Stoke Lacy to have been void, and the plaintiff's title as patron to have accrued. I therefore think there should be judgment for the plaintiff.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—The only difficulty that has presented itself to my mind in this case is, whether, on the pleadings, it does not appear that the right of the crown had intervened; but still there is not enough doubt on that ground for the Court to act upon. In *Greenwood* v. *The Bishop of London* (*b*), the patron, being also the rector of B., agreed for 8,750*l.* to convey to D., clerk, the advowson in fee, and immediately to resign the rectory and

(*a*) 4 Rep. 75 b. And see *Dygby's* case, 4 Rep. 78 b.

(*b*) 5 Taunt. 727; S. C. 1 Marsh. 292.

present D. thereto, pay all expenses, and allow D. 60*l.* for dilapidations; and that D. should have the profits from a day then past. The ordinary refused to accept the vendor's resignation, whereon D. agreed with the patron for the purchase of the advowson at 8,000*l.*, allowing 60*l.* for dilapidations; and he was to be entitled to the profits of the rectory from the same past day: and, four days after, the vendor agreed to grant him a lease of the tithes for the vendor's life, at a pepper-corn rent. The conveyances were accordingly executed, and the money paid. Upon the death of the vendor, the king presented to that turn for simony; and, upon the death of the king's clerk, the heir of the vendor disturbed the purchaser, insisting that the grant of the advowson was void by reason of simony. It was held that the conveyance purporting to carry the whole advowson, including the next presentation, was at all events (assuming the contract to be simoniacal) no further void than the simoniacal part of the transaction, which could touch only the next presentation, extended; and that so much of the conveyance as applied to the legal part, the fee of the advowson, was to be supported.

Mr. Justice ALDERSON concurred.

Judgment for the plaintiff.

Mr. Serjeant *Ludlow* afterwards moved for leave to amend the pleas; but the Court refused to grant it.

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Monday, April 22nd.

On the trial of a writ of right, where the mise was joined on the mere right, the tenant was required to begin by shewing his title to the premises, notwithstanding his having tendered the demi-mark at the swearing of the grand assize.

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THIS was a writ of right brought to recover certain premises situate in the parish of St. Giles-in-the-Fields, in the county of Middlesex. The first count stated, that N. Spires, the elder, deceased, whose heir the demandant was, was seised &c. in his demesne as of fee and right, in the time of peace, in the time of the Lord George the Third, &c., to wit, within sixty years now last past, by taking the esplees and profits thereof to the value &c.; and from him, the said N. Spires the elder, because he died intestate, the right of the tenements aforesaid, with the appurtenances, descended to the demandant, his only son and heir, who now demands the same; and that such is his right, he offers &c.—The second count stated that Charles Parker, deceased, whose heir he the demandant was, was seised &c., and, by his will, duly executed and attested according to law, devised the same to R. Thatcher and N. Spires the elder, and their heirs; whereby the right of the tenements aforesaid, with the appurtenances, descended to the said R. Thatcher and N. Spires the elder; and from the said N. Spires the elder, who survived the said R. Thatcher, the right of the tenements aforesaid, with the appurtenances, descended to the demandant, the only son and heir of the said N. Spires the elder, and he now demands the same; and that such is his right, he offers &c.

The tenant defended the right of the demandant, and the seisin of N. Spires, the elder, deceased, when &c., and he put himself upon the grand assize of our lord the king, and prayed a recognition to be made whether he, the tenant, had a greater title to hold the tenements, &c., to him and his heirs, as he now held the same, or whether the demandant had title to hold the same tenements, &c., as he had above demanded the same. Issue was joined on the mere right.

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The right was tried at bar. The knights and recognitors having been called over, were about to be sworn, when—

Mr. Serjeant *Stephen*, on the part of the tenant, tendered the demi-mark; he therefore prayed that the demandant might begin by shewing the seisin of his ancestor. [Mr. Justice *Alderson* referred to *Tooth*, dem., *Bagwell*, ten. (*a*), where the tenant was required to begin, notwithstanding the tender of the demi-mark; and observed, that, unless the learned Serjeant was prepared to distinguish the case at bar from that case, he must go on, the Court being for the present prepared to adhere to it.] In that case, the demi-mark was tendered at the trial only, which has been supposed not to be enough: here it was tendered at the joining of the mise (*b*), which has often been held to put it upon the demandant to begin by shewing his seisin (*c*). In Littleton (*d*) is the following case: "John Barre brought his writ of right against Reynold, and demanded certaine lands, &c. John Barre counted of the seisin of one Ralfe, his ancestor, in the time of King Henry, and Reynold upon the mise joyned tendred halfe a marke for the time, &c. And hereupon Herle, J., said to the grand assize after that they were charged upon the meere right—You good men, Reynold gave halfe a marke to the king for the time, to the intent that if you find that the ancestor of John was not seis-

(*a*) 11 J. B. Moore, 349; S. C. 3 Bing. 446.

(*b*) The fact was not so.

(*c*) *Hardman* v. *Clegg*, Holt, N. P. C. 657. In that case, Mr. Baron Wood ruled that the tender of the demi-mark before the swearing of the assize was sufficient to put the demandant to shew the seisin of his ancestor. And in *Throgmorton* v. *Broke*, Gloucester Summer Assizes, 1800, Mr. Justice Heath is said to have held, that, upon the tender of the demi-mark in Court at the time of trial, the demandant must begin. Roscoe, p. 217.

(*d*) Section 514. And see Bac. Abr. title "Droit de Recto, pl. 49."

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sed in the time that the demandant hath pleaded, you shall enquire no further upon the right; and for this you shall tell us whether the ancestor of John (Ralfe by name) were seised in King Henry's time, as he hath pleaded, or not. And if you find that he was not seised in this time, you shall enquire no more; and if you find that he was seised, then you shall enquire further of the writ." If the Court hold the tenant to be bound to begin in this case, this pernicious consequence will follow, that any man may in future be compelled to exhibit his title to his estate in a Court of justice, without any colour of right being shewn to be in his opponent; a practice manifestly contrary to law and reason (*a*).

Lord Chief Justice TINDAL.—It appears to me, upon looking at the case of *Tooth*, dem., *Bagwell*, ten., decided by this Court in the year 1826, that no distinction can be discovered between that case and the present. If it had been possible, I must confess that I should have been glad to get rid of the rule that was there laid down. Upon the record in this case, no entry is to be found of a tender of the demi-mark at the joining of the mise upon the mere right (*b*): it therefore falls precisely within the case I have mentioned. Although the Court is not constituted exactly

(*a*) And see Wms. Saund. Vol. 2, p. 45 *m*, (n).

(*b*) It appears from the record in the case of *Tooth* v. *Bagwell* (with a copy of which the Reporters have been favoured by Mr. Justice Gaselee), that the demi-mark *was* tendered at the time of joining the mise; though that fact is not stated in the reports of the case.

The authorities are conflicting both as to the time at which the demi-mark must be tendered, and also as to the effect of such tender when made. In Viner's Abridgment, title "Droit de Recto," (D) pl. 4, it is said: "The tenant *before any issue* may tender the half-mark, *to have the seisin inquired*"—citing Bro. Abr. "Droit de Recto," pl. 37. 34 E. 3. Fitzh. "Judgment." Again, in Viner, "Droit de Recto," (D) pl. 13: "In a writ of right it was ruled *per Cur.*—first, that the demi-mark *ought to be tendered at the joining of the*

as it was at the time that case was decided, yet two of the learned Judges who took part in it are members of the

mise, and yet the Judges in the present case took it at the appearance of the jury—secondly, *the tenant ought to commence in the giving of evidence*—thirdly, *the jury cannot give a special verdict*. Mo. 762, pl. 1057, Trin. 3 Jac. C. B *Andrews* v. *Ld. Cromwell*." And see *Spyrtie* v. *Read*, Dyer, 247 b, pl. 75, where the reason assigned for the tenant's being compelled to begin is, because the mise is joined and prayed by him first. Dyer says, the same order was observed in *Newburgh* v. *Thornhill*, 9 Eliz., and in *Haydon* v. *Ibgrave*, Trin. 28 Eliz. See also Bac. Abr. "Droit de Recto," pl. 49. "In a writ of right, the demandant counted of the seisin of his ancestor, or of himself; this shall not be traversed, but the tenant may tender the half-mark *to inquire of the seisin*"—Vin. Abr. "Droit de Recto," (E) pl. 8—citing Br. "Droit de Recto," pl. 32. 10 E. 4. 9.

In Roscoe on Real Actions, 216, it is said: "The effect of the tender of the demi-mark appears to be to put the demandant, in the first instance, upon the proof of the seisin, as stated in his count; that is, to prove that the seisin was in the king's reign there stated. If the demandant proves the seisin as stated, then the cause goes on as if the demi-mark had never been tendered, and the grand assize proceed to inquire of the mere right; in which inquiry it seems that the tenant is to maintain his title in the first instance. If the demandant cannot prove the seisin as stated, then no inquiry is made into the mere right, and the grand assize must find for the tenant.

The only authorities cited by Mr. Roscoe in support of this opinion are the 514th section of Littleton (set out *ante*, p. 119), and Fitzherbert's Abridgment, title "Droyte," pl. 26. It seems, however, to be perfectly consistent with both these authorities (which in point of fact are the same), that the only effect of the tender of the demi-mark is, to put the demandant to proof of the seisin as stated in his count, but not to alter the *course* of the inquiry.

It does not seem to be necessary that the tender of the demi-mark should be put upon the record; but that is probably the better course, for, though it has been doubted whether a tender at the trial would suffice, it has never been held to be an objection that the tender was made at the joining of the mise; and, unless entered upon the record, the fact does not appear.

Mr. Justice Blackstone, in his Commentaries (Vol. 3, p. 195), says—"In the progress of this action, the demandant must allege some seisin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the right from the person so seised to himself; to which the tenant may answer by

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Court at the present moment; and it would therefore be unseemly to discuss the matter again. Besides, from the time of that decision down to the present time, it has been acted upon by all the Judges. Cases have occurred on the Northern Circuit within my own recollection, where the demi-mark has been tendered at the assizes, and yet the tenant has been required to commence. The parties in this case will not be concluded by our decision: if erroneous, advantage may be taken of it; but at present I think we must hold ourselves bound by the case of *Tooth* v. *Bagwell.*

Mr. Justice PARK.—I was one of the Judges of this Court when *Tooth* v. *Bagwell* was decided. The rule there laid down may for any thing I know be an inconvenient one. The case of *Angell* v. *Angell* was tried before me at York; and I there decided according to the authority of *Tooth* v. *Bagwell,* and my decision was never disputed, although it was urged at the time that the rule was inconvenient. I am at all times most happy to retract an erroneous opinion, and to reconsider any matter that requires reconsideration; but, as at present advised, I do not think we can consistently determine otherwise than in conformity with *Tooth* v. *Bagwell.*

Mr. Justice GASELEE.—I have always understood the course now adopted by the Court to have been the law, since the year 1798, when the case of *Galton* v. *Harvey* was tried before Lord Chief Justice Eyre at Dorchester. I made a note of that case at the time (*a*): the tenant be-

denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them; *which puts the demandant upon the proof of his title.*"

(*a*) "Pell, for the demandant, was about to open the pleadings; but it was agreed to be settled, that, notwithstanding the seisin was to be inquired into, the tenant must begin: and it was said to

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gan. The rule has been acted upon ever since, with the single exception of the case of *Hardman* v. *Clegg*, tried before Mr. Baron Wood, at Lancaster. There, the demi-mark was tendered at the trial, and the learned Baron directed the demandant to begin (*a*). That case was cited and expressly over-ruled in *Tooth* v. *Bagwell*. In this Court we are bound by our own decision: if it is intended to question it, that must be done elsewhere. What the result of that appeal may be, is not for us now to say. But in the mean time I think this case must be governed by *Tooth* v. *Bagwell* (*b*).

Mr. Justice ALDERSON.—The case of *Tooth* v. *Bagwell* is not to be distinguished from the present. Until that case is over-ruled, it must be the governing authority, in that Court at least in which the decision was pronounced. Two out of the four Judges who formed the Court at that time are now called upon to overturn that case. I think it would be improper to do so. I pronounce no opinion as to the propriety of that decision: it is still a question well worthy of consideration. The case of *Hardman* v. *Clegg* goes too far on the other side. It was there held, that, after tender of the demi-mark, there was a separate issue on the seisin of the demandant's ancestor to be first tried. It would, however, appear from Littleton, that both issues are to be summed up to the jury at the same time, the

have been so ruled in *Luke* v. *Harris*, 2 Sir W. Blac. 1261, 1293. And Lord Chief Justice Eyre, in summing up, told the jury, that, if they found no seisin, they were to inquire no further." From Mr. Justice Gaselee's note of *Galton* v. *Harvey*.

In that case also the demi-mark was tendered at the joining of the mise, as appears by the record.

(*a*) In *Hardman* v. *Clegg* the demi-mark is stated by Mr. Roscoe to have been tendered at the joining of the mise, though there was no averment to that effect upon the record, nor does the fact appear in the report: it was also tendered at the swearing of the jury.

(*b*) See the report of this case in 2 Car. & Payne, 271.

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Judge telling them to find upon the seisin first (*a*). It is very like the case of a principal and an accessary tried upon the same indictment: the jury are in such case told first to ascertain whether the principal be guilty or not; and their decision as to him may render it unnecessary for them to consider as to the other. The passage cited from Littleton is perfectly consistent with either party's commencing. It is enough for me to say on this occasion, that, for the present, I am satisfied to adhere to the case of *Tooth* v. *Bagwell*. Mr. Justice Bosanquet acted upon its authority on the last Circuit. The tenant will not be concluded by this determination; it is open to him to tender a bill of exceptions (*b*).

A book of accounts kept by a deceased executor, charging himself with the receipt of rents in his character of executor, is admissible in evidence for the purpose of shewing that he had received rent on account of a particular tenement; notwithstanding he took a remote contingent interest under the will.

The grand assize was then sworn, and Mr. Serjeant *Stephen* opened the tenant's case, and called witnesses in support of it. His title consisted merely of a possession of six or seven years. In support of the demandant's case, a book purporting to be a book of accounts kept by one Thatcher, the acting executor under the will of Charles Parker, was offered in evidence. Charles Parker, by his will, which was produced, devised to Thatcher and Spires the elder, all his freehold messuages, &c., in trust to pay the rents and profits thereof to his brother Robert Parker for life; and the testator desired that Thatcher, and, in case of his decease, then that Spires should see that the rents were duly collected, and applied to the use and benefit of Robert Parker for life, and the heirs of his body, in tail remainder; and, after his decease, the rents to be equally divided between five persons (of whom Thatcher was one), share and share alike, for and during their lives and the life

(*a*) This was precisely the course adopted by Lord Chief Justice Eyre in the case of *Galton* v. *Harvey*.

(*b*) A bill of exceptions was tendered, but afterwards withdrawn, it having been agreed that the finding of the jury should be turned into a special verdict.

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of the survivor of them. It did not, however, appear that Thatcher had actually taken any thing under the will. In this book, in which Thatcher had kept an account of monies received by him as Parker's executor, he charged himself with the receipt of rents for the premises in question. The book was entitled "The estate of the late C. Parker." It was produced by the solicitor of the surviving executor under Thatcher's will, into whose hands it had come in the course of a suit in equity that had been commenced by the present demandant against Thatcher's executors for an account. In that suit, Thatcher's executors had paid into Court the balance of the account.

Mr. Serjeant *Stephen* (for the tenant) objected that this book was not evidence. He submitted, that, under the will of Charles Parker, the legal estate was in Thatcher and Spires the elder; that Thatcher could not therefore have been called if living; and, consequently, that accounts kept by him could not now be received, notwithstanding they might charge himself.

Mr. Serjeant *Wilde, contrà.*—Thatcher took no disqualifying interest under the will. The accounts offered charged him as executor, and were against his interest, and therefore admissible evidence.—He cited *Doe* d. *Brune* v. *Rawlins* (*a*).

Lord Chief Justice TINDAL.—It appears to me, on looking at the book, and considering the circumstances under which the entries therein were made, that it was an ac-

(*a*) 7 East, 279. And see Starkie on Evidence, Vol. 2, p. 775—"It has been decided so long ago as the time of Lord Hale, that an executor having no interest in the surplus is a good witness to prove the will in a cause relating to the estate (Per Lord Ellenborough, in *Bettison* v. *Bromley*, 12 East, 253); and this has been followed by many other decisions to the same effect."

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count by Thatcher strictly and properly charging himself; and therefore that it is good evidence.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—The executors of Thatcher appear to have been called upon by the compulsory process of the Court of Chancery to account. It seems to me that this book is perfectly good evidence.

Mr. Justice ALDERSON.—Thatcher received the money, and therefore had peculiar means of knowledge. His interest was clearly the other way: he charges himself.

The book was accordingly received.

Lord Chief Justice TINDAL, in summing up, told the jury that it was for them to say, balancing the testimony adduced on either side, which party had the better mere right; and that, where the tenant shewed himself to have been in possession peaceably, without paying rent to any one, the law would presume the fee to be in him, unless there appeared circumstances to warrant the inference that his estate was less than a fee.

The jury found for the demandant (*a*).

(*a*) The question as to the seisin of the demandant was reserved for a special verdict. This was by consent; for, it seems that there cannot strictly be a special verdict in a writ of right. See Roscoe on Real Actions, 300, and Viner's Abridgment, title "Droit de Recto," (D), pl. 13.

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Wednesday, April 24th.

REYNARD, Assignee of BIRCH, an Insolvent Debtor, *v.* ROBINSON.

J. S. being indebted to the defendant, the latter wrote to demand payment, saying that he must have the money "in a few weeks," or he would put it in the hands of an attorney to get. J. S., *in consequence* of this demand, paid the debt in three weeks, and went to prison, and petitioned the insolvent debtors' court within three months afterwards:—*Held*, that this was not a voluntary payment, or fraudulent and void within the meaning of the 32nd section of the statute 7 Geo. 4, c. 57.

THIS was an action of assumpsit tried before Mr. Justice James Parke, at the York Summer Assizes, 1832, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

"The plaintiff, as assignee of the estate and effects of Joseph Birch, an insolvent debtor, who had taken the benefit of the statute 7 Geo. 4, c. 57, sought to recover from the defendant the sum of 40*l.*, which he alleged to be due to him, as such assignee, under and by virtue of the 32nd section of the act (*a*). The defendant lent to the insolvent, in or about the month of November, 1830, the sum of 40*l.*, upon the application of the insolvent's brother. The money remaining unpaid, the defendant, on the 10th September, 1831, wrote the following letter to the insolvent:—

"'Sir,—I wrote you some months ago, to desire you to bring me the money I lent you last November; to which I have received no reply. I fully expected you would

(*a*) Which enacts—"That, if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act; Provided always that no such conveyance, assignment, transfer charge, delivery, or making over shall be so deemed fraudulent and void, unless made *within three months before the commencement of such imprisonment*, or *with the view*

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have paid it back about May-day; and I think it strange I have not seen or heard from you. Now, the fact is, I want the money, and must have it *in a few weeks:* and, if you do not bring or send it, I certainly shall put it into the hands of an attorney to get; but hope you will save me the trouble, and yourself the expense of such proceedings.'

"No action or other proceeding was commenced by the defendant against the insolvent for the recovery of the money; nor was any attorney employed to bring such action. In the beginning of October, 1831, the insolvent (who was then in insolvent circumstances), *in consequence of the above letter,* repaid the said sum of 40*l.* to the defendant. The insolvent was arrested on the 18th November, 1831, at the suit of the plaintiff, and was carried to York Castle on the 21st. He presented his petition to the court for relief of insolvent debtors, and executed the usual assignment of his estate and effects pursuant to the statute, on the 23rd; and was declared and adjudged to be entitled to the benefit of the acts of parliament for the relief of insolvent debtors, on the 7th March, 1832."

The question for the opinion of the Court was—Whether or not the payment of the said sum of 40*l.* made by the insolvent to the defendant under the circumstances above mentioned, was a voluntary payment or transfer of money within the meaning of the 32nd section of the statute (*a*). If the Court should be of opinion that it was, a

or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, *of petitioning the said court for his or her discharge from custody under this act.*"

(*a*) See *Herbert* v. *Wilcox* (3 Moore & Payne, 515; S. C. 6 Bing. 203), where it was held that a voluntary payment by a debtor to his creditor, such debtor being in insolvent circumstances at the time, and the payment being within three months before his imprisonment although in discharge of a *boná fide* debt, is a fraudulent delivery of money, and void under the 32nd section of the 7 Geo. 4, c. 57, although the word "payment" is not used in the clause.

verdict was to be entered for the plaintiff, damages 40*l.*; if otherwise, a verdict to be entered for the defendant.

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiff.—The 31st section of the statute 7 Geo. 4, c. 57, contemplates two distinct events in which the acts therein enumerated shall be void—the one, that the party is at the time in insolvent circumstances, and that the transfer is voluntary—the other, that the act is done within three months before the commencement of the imprisonment of the party, *or* with a view to his taking the benefit of the act: the former part of the clause applies to this case. The question is, whether the payment by the insolvent to the defendant was voluntary, or the result of fair pressure and importunity on the part of the latter. The defendant's letter of the 10th September, 1831, fixes no precise time for the payment of the money; the defendant merely says that he must have it "in a few weeks." One can very well understand that the payment of money on an instant demand may be any thing but a voluntary act. But, in the present case, the insolvent chose his own time for the payment; it was made three weeks after the receipt of the letter, and without any new demand. In *Cook* v. *Rogers* (*a*), where a payment had been made to a creditor by a person on the eve of bankruptcy; and the bankrupt, who was called as a witness, stated that his object in making the payment was, to secure his father (who was surety for the debt), and at the same time to benefit the defendant—the Lord Chief Justice told the jury, that, in order to ascertain whether or not the payment was made voluntarily and in contemplation of bankruptcy, they were at liberty to take into consideration that which the bankrupt had stated to have been passing in his mind at the time: and that direction afterwards re-

(*a*) 5 Moore & Payne, 353; S. C. 7 Bing. 438.

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ceived the confirmation of the Court. Mr. Justice Alderson there said (*a*): "In every case of this description there are two points; the one, whether or not the payment has been made in contemplation of bankruptcy; the other, whether it were a voluntary payment. Both these are questions of fact, which must be left to the jury upon the circumstances of each particular case, and the evidence adduced at the trial. If, then, whether the payment be voluntary or not, is a question of fact, all the authorities upon the subject appear to me to be reconcilable." And the learned Judge, after referring to the language of Lord Ellenborough in the cases of *Crosby* v. *Crouch* (*b*) and *Thornton* v. *Hargreaves* (*c*) and of Lord Alvanley in *Hartshorn* v. *Slodden* (*d*), continued—"It therefore seems to me that the motives of the bankrupt may be more or less material according to the situation in which he is placed at the time of the delivery of the goods or payment of money to a creditor, as well as to the nature of the threat, and the degree of the urgency of the demand." In order to distinguish between payments made voluntarily and such as are made compulsorily, the true criterion is, has the payment been induced by a threat of legal process. Now, in the present case, there is nothing to repel the presumption of the payment being voluntary; the debtor was insolvent at the time, and on the eve of incarceration; the payment was not the immediate result of pressure on the part of the creditor; the demand preceded it by three weeks: and the insolvent could not, under the circumstances, have been influenced by any apprehension of legal process. The only expression in the whole case that can possibly lead to a different conclusion is, the statement that the payment was made *in consequence* of the defendant's letter of the 10th September. The whole tenor of the facts stated shews that this does not mean that the

(*a*) 5 Moore & Payne, 367.
(*b*) 11 East, 260.
(*c*) 7 East, 548.
(*d*) 2 Bos. & Pul. 585.

payment was strictly and properly the *consequence* of the demand, but merely that it was made *subsequently* to it.

Mr. Serjeant *Merewether, contrà*, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears to me, on the best construction I can put upon the facts stated in this case, coupled with the expressions used by the defendant in his letter to the insolvent of the 10th September, that the payment in question must be taken to have been made in consequence of the pressure of that letter. The defendant gives his debtor "a few weeks" in which to make the payment; the money was paid within three weeks: the words of the letter are positive—"I want the money, and must have it *in a few weeks:* and, if you do not bring or send it, I certainly shall put it into the hands of an attorney to get." It seems to me that the defendant was in his own mind intending to have recourse to legal proceedings to enforce the payment; and it is expressly stated as a fact in the case, that, in consequence of this letter, the insolvent did repay the money. The case, therefore, finds the very point in issue between the parties. If the cause had been tried, the Judge, upon such a state of facts, could have directed the jury no otherwise than by telling them to find for the defendant. I am therefore of opinion that the defendant is entitled to our judgment.

Mr. Justice PARK.—Putting ourselves in the place of a jury, I am of opinion that the defendant is entitled to the verdict. The defendant's letter of the 10th September legalizes the payment under the insolvent debtors' act. In that letter the defendant says he must have the money due to him in a few weeks; and the payment was made within three weeks afterwards, and in order to avoid the pressure which that letter threatened; for, I cannot, from the facts

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stated, infer otherwise than that the payment was made in compliance with that demand. The case expressly states the payment to have been made in consequence of the letter. I do not read the words "in consequence" in the sense suggested by my brother Wilde. In this instance I understand them to mean that the party acted under the influence of the threat contained in the letter.

Mr. Justice GASELEE.—Had the letter stated that the money must be paid in three weeks, or legal proceedings would be had recourse to, there could certainly have been no doubt. How, then, is the case altered by the phrase used?

Mr. Justice ALDERSON.—The plaintiff has decided the case against himself by stating that the payment was made in consequence of the letter of the 10th September.

Judgment for the defendant.

Wednesday, April 24th.

GROTTICK, Assignee of J. G. LLOYD, Esq., Sheriff of WARWICKSHIRE *v.* W. PHILLIPS and Two Others.

By the writ the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—*Held* (on *general* demurrer to a declaration on the bond) to be no variance.

Quære, if the demurrer had been *special?*

THIS was an action of debt upon a bail-bond. The declaration stated that the plaintiff, on the 22nd December, 1832, sued and prosecuted out of the Court of Common Pleas, at Westminster, in the county of Middlesex, a certain writ of our lord the king called a writ of *capias* against the said W. Phillips (and one S. Phillips), directed to the sheriff of the county of Warwick, and dated &c.; by which said writ our said lord the king commanded the said sher-

iff that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same and take the said W. Phillips (and the said S. Phillips), of &c., if he (and the said S. Phillips) should be found in his bailiwick, and him (and the said S. Phillips) safely keep until he (and the said S. Phillips) should have given him bail or made deposit with him according to law, in an action of assumpsit at the suit of the said now plaintiff, or until the said W. Phillips (and the said S. Phillips) should by other lawful means be discharged from his custody; and our said lord the king did thereby further command the said sheriff, that, on the execution thereof, he should deliver a copy thereof to the said W. Phillips (and the said S. Phillips), &c. &c. [setting out the writ, with the memorandum, indorsements, and warning to the defendant, as required by the rules (*a*) of Michaelmas Term, 3 Will. 4]. Averment that the writ was delivered to J. G. Lloyd, Esq., who then and from thence until and at and after eight days after the execution of the said writ on the said W. Phillips, as thereinafter mentioned, was sheriff of the said county of Warwick, in due form of law to be executed: by virtue of which said writ the said J. G. Lloyd, so being sheriff as aforesaid, afterwards, and within four calendar months from the date thereof, including the day of such date, and not afterwards, to wit, on the 1st January, 1833, and within his bailiwick as such sheriff, in the county of Warwick aforesaid, executed the said writ, and took and arrested the said William Phillips by his body, and then and there had and detained him in his custody as such sheriff at the suit of the plaintiff for the cause aforesaid: and the said J. G. Lloyd then and there, upon and forthwith after the execution of the said writ, caused a copy of the said writ, together with every memorandum and notice subscribed thereto, and all indorsements thereon, to be delivered to the said

(*a*) *Ante*, Vol. 2, 322, *et seq.*

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W. Phillips: and the said W. Phillips being so arrested and in custody of the said J. G. Lloyd, so being sheriff as aforesaid, by virtue of the said writ at the suit of the plaintiff, the said J. G. Lloyd afterwards, and within eight days next after the execution of the said writ as aforesaid, inclusive of the day of such execution, to wit, on &c. last aforesaid, and within his bailiwick, as such sheriff, in the county of Warwick aforesaid, *took bail for the said W. Phillips* causing special bail to be put in for him to the said action in his Majesty's Court of Common Pleas, as required by the said writ, and according to the form of the statute in such case made and provided; and on that occasion the defendants then and there, to wit, on &c. last aforesaid, in the county aforesaid, by their certain writing obligatory commonly called a bail-bond, sealed &c. [setting out the bail-bond]; with and under a certain condition thereunder written, whereby it was conditioned that *the said William Phillips* should appear in his Majesty's Court of Common Pleas at Westminster, to answer the now plaintiff in an action of assumpsit, and should cause special bail to be put in to the said action in eight days from the date thereof, then that obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect: *prout, &c.* Averment that W. Phillips did not appear to the action, or cause special bail to be put in for him, whereby the bail-bond became forfeited; and that the sheriff assigned it to the plaintiff: by means whereof an action had accrued &c.

Plea—that the said J. G. Lloyd, so being sheriff as aforesaid, did not take and arrest the said W. Phillips by his body under and by virtue of the said writ of *capias* in the declaration mentioned, *modo et formâ:* without this that the writing obligatory in the declaration mentioned was taken by the said J. G. Lloyd, as such sheriff as aforesaid, by virtue and in pursuance of the said writ of *capias*, con-

ditioned for the appearance of the said W. Phillips in the said action in the said writ mentioned, *modo et formâ*.

Replication—protesting against the sufficiency of the plea—that the said writing obligatory in the declaration mentioned was taken by the said J. G. Lloyd, as such sheriff as aforesaid, by virtue and in pursuance of the said writ of *capias*, conditioned for the appearance of the said W. Phillips in the said action in the said writ mentioned, *modo et formâ*.

General demurrer, and joinder.

On the case coming on for argument—

Mr. Serjeant *Wilde*, for the plaintiff, objected that the point intended to be argued was not marked in the demurrer books, nor had any notice been left at the chambers of the Lord Chief Justice, as required by the rule of Court of Trinity Term, 11 Geo. 4 (*a*): he therefore prayed judgment.

On special arguments, where either party has neglected to mark the points to be argued, in obedience to the rule of T. T. 11 Geo. 4 (C. P.), the Court will not allow the case to be argued, but will give judgment against the party guilty of the neglect.

Mr. Serjeant *Coleridge*, *contrà*, observed that the attention of the plaintiff was distinctly called to the point by the pleadings, and therefore no notice was necessary; and that the rule was too modern to be so strictly dealt with.

Lord Chief Justice TINDAL.—I should have been very much disposed to give judgment *instanter*, but that I fear the plaintiff would thereby be further delayed. I desire it, however, to be distinctly understood, that, in future,

(*a*) By which it is ordered, "that, from henceforth, in all special arguments in this Court, notice in writing of the points which are intended to be insisted upon by each of the parties, be delivered to the Judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the Judges, or on separate paper; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application."

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when a party neglects to comply with the rule of Trinity Term, 11 Geo. 4, judgment shall be given against him.

Mr. Justice PARK.—I am disposed to think that the defendant should have no indulgence; but that judgment ought to be given now.

Mr. Justice GASELEE.—Although the rule in question is comparatively modern in this Court, it is much older in the Court of King's Bench (*a*).

Mr. Justice ALDERSON.—The only doubt I entertain as to the propriety of giving judgment immediately, is, that no such penalty is mentioned in the rule of Trinity Term, 11 Geo. 4. After this intimation, however, it must be understood as being embodied in that rule.

The argument was accordingly adjourned on the terms of the defendant paying the costs of the day.

Thursday, April 25th.

The question to be argued was, whether the bond declared on was a good one within the statute (23 Hen. 6, c. 9), or authorized by the writ, being taken and conditioned for the appearance of the defendant W. Phillips in a separate action, instead of a joint one, as required by the process.

Mr. Serjeant *Coleridge*, in support of the demurrer, submitted that the original suit was improperly described in the condition of the bail-bond, the condition being for the appearance of William Phillips only, not shewing that he was sued with any other person; and therefore that the bond was not warranted by the statute: and he referred

(*a*) See R. E. 2 Jac. 2, revived by R. H. 38 Geo. 3, K. B.: and see R. H. 48 Geo. 3, C. P., 1 Taunt. 203.

to Mr. Serjeant Williams's note to the case of *Posterne* v. *Hanson* (*a*), where all the authorities are collected. [Lord Chief Justice *Tindal* observed that the objection (if tenable) was at most matter of form, and should have been shewn for cause on special demurrer; and that it was consistent with the statement in the declaration, that the former action was against two persons.] The learned Serjeant cited *Renalds* v. *Smith* (*b*), where a *capias ad respondendum* was made returnable "before his Majesty's Justices of the Bench, at Westminster," by virtue of which the sheriff issued his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff might have his body "before his said Majesty, at Westminster;" and the bailiff took a bail-bond conditioned for the defendant's appearance "before his said Majesty, at Westminster:" it was held, on *general* demurrer, that the variance was fatal, and the bond void.

Lord Chief Justice TINDAL.—I think the objection taken to the declaration in this case does not properly arise on general demurrer, because there is not of necessity that variance of which the defendant complains. That part of the writ which is mandatory on the sheriff commands him "to take William Phillips and Samuel Phillips, if he (W. Phillips) and the said S. Phillips should be found in his bailiwick, and him and the said S. Phillips safely keep until he and the said S. Phillips should have given him bail or made deposit with him according to law, in an action of assumpsit at the suit of the now plaintiff." The words are general, though I admit that it is impossible to read the writ without seeing that two defendants are meant. The condition of the bond follows the very words of the mandate. How are we to say that the bond was not intended to be taken in an action against two? The objection ought at least to have been pointed out as cause of special demurrer.

(*a*) 2 Wms. Saund. 59, n. (3). (*b*) 2 Marsh. 258; S. C. 6 Taunt. 551.

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Mr. Justice GASELEE.—The plaintiff was not bound to *arrest* both the defendants in the original action: one might have been served only.

The rest of the Court concurring—

Judgment for the plaintiff.

Friday, April 26th.

AIRETON *v.* DAVIS, Esq., Sheriff of ESSEX.

By the statute 3 Geo. 4, c. 39, a warrant of attorney not filed within twenty-one days of its execution is declared to be fraudulent and void against the assignees under a commission afterwards sued out against the party giving it:—*Held*, that, in order to let in the objection that the statute has not been complied with, it must first appear that there is a *valid* commission against the party. And *semble* that it lies upon him who seeks to impeach it, to shew that the warrant of attorney was not filed.

THIS was an action on the case, brought by the plaintiff, a judgment creditor of one John Barker, against whom a commission of bankrupt had issued, against the defendant, sheriff of the county of Essex, for a breach of duty.

The first count of the declaration charged the defendant with having falsely returned *nulla bona* to a writ of *fieri facias* issued against the goods of Barker at the suit of the plaintiff. The second was for not levying when he might and ought to have levied. The third count stated, that the plaintiff, in Trinity Term, 1 Will. 4, in the Court of our lord the king before the king himself, by the consideration and judgment of the same Court, recovered against John Barker a certain debt of 260*l.*, and also sixty-five shillings which in and by the same Court were adjudged to the plaintiff, and with his assent, for his damages which he had sustained as well by occasion of the detaining of the said debt as for his costs and charges by him about the said suit in that behalf expended, whereof the

The sheriff seized goods under a writ of *fi. fa.* on the 16th June, and remained in possession, taking no steps to effect a sale, though urged so to do by the plaintiff's attorney. On the 5th of October, a commission of bankrupt was sued out against the debtor, and the goods were delivered up by the sheriff to the assignees under an indemnity, and *nulla bona* returned to the *fi. fa.* *Quære* whether, under these circumstances, the sheriff is not liable to an action on the case at the suit of the execution-creditor, for the loss of the fruits of his judgment.

Quære whether an order of the Court of Review in bankruptcy (under the 6 Geo. 4, c. 16, s. 18, and the 1 & 2 Will. 4, c. 56, s. 2), for substituting another debt to support a commission in lieu of that of the original petitioning creditor, can be used to the prejudice of a party who has already brought an action in which he seeks to impeach the validity of the commission by reason of the insufficiency of the petitioning creditor's debt.

said John Barker was convicted, as by the record and proceedings thereof still remaining in the same Court of our said lord the king before the king himself at Westminster, will more fully appear: and the plaintiff further said that the said judgment being in full force, and the said debt and damages remaining unpaid and unsatisfied, he, the plaintiff, on the 13th June, 1 Will. 4, for having execution of his said judgment, sued and prosecuted out of the said Court of our said lord the king before the king himself, at Westminster aforesaid, a certain writ of our lord the king called a *fieri facias*, directed to the sheriff of Essex; by which said writ our said lord the king commanded the said sheriff, that of the goods and chattels of the said John Barker in his the said sheriff's bailiwick he should cause to be levied the said debt and damages, and that he should have that money before our said lord the king at Westminster aforesaid, on Thursday, the 3rd November then next ensuing, to render to the plaintiff for his said debt and damages; and that the said sheriff should have then there that writ; which said writ, afterwards, and before the delivery thereof to the sheriff as thereinafter mentioned, to wit, on &c. last aforesaid, at &c. aforesaid, was duly indorsed with a direction for the said sheriff to levy 146*l.* 5*s.*, besides sheriff's poundage, officer's fees, and all other incidental expenses; and which said writ so indorsed, afterwards and before the time appointed for the return thereof, to wit, on the 14th June, in the year aforesaid, in &c. aforesaid, was delivered to the defendant, who then and from thence until and at and after the time appointed for the return of the said writ, was sheriff of Essex, to be executed in due form of law: by virtue of which said writ the defendant, so being sheriff of the said county of Essex as aforesaid, afterwards, and before the time appointed for the return of the said writ, to wit, on 16th June, in the year aforesaid, in &c. aforesaid, seized and took in execution divers goods and cha-

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tels of the said John Barker, of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and remained and continued in possession of the said goods and chattels for divers long spaces of time, to wit, from the 16th June, in the year aforesaid, until the 1st August then next ensuing, and from thence until John Barker committed a certain act of bankruptcy, as thereinafter mentioned; the said sums of money so indorsed on the said writ, and directed to be levied as aforesaid, during all that time remaining unpaid to the plaintiff, to wit, in &c. aforesaid: and the plaintiff further in fact said, that, during any part of the time aforesaid, he, the defendant, as such sheriff as aforesaid, *could and might and ought to have sold the said goods and chattels* under and by virtue of the said writ, and to have raised thereout the monies indorsed on the writ, and directed to be levied as aforesaid, ready to have been paid to the plaintiff on the return of the said writ, to wit, in &c. aforesaid: yet the defendant, so being sheriff of the said county of Essex as aforesaid, not regarding the duty of his office as such sheriff as aforesaid, but contriving and unjustly and wrongfully intending to injure, prejudice, and aggrieve the plaintiff in this behalf, and to deprive him of the monies so indorsed on the said writ and directed to be levied as aforesaid, and of the means of obtaining the same, wilfully neglected the execution of his office, and fraudulently and wrongfully, and without the consent of the plaintiff, forbore to sell the said goods and chattels of the said John Barker, from the said 16th June, in the year aforesaid, until the said 1st August then next following, and from thence until afterwards, and before the return of the said writ, the said John Barker committed a certain act of bankruptcy, whereupon he the said John Barker was afterwards, and before the return of the said writ, declared a bankrupt under and by virtue of the statute then in force concerning bankrupts: by means where-

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of the said goods and chattels, so being in the hands of the said sheriff as aforesaid, under and by virtue of the said writ as aforesaid, unsold, then and there, to wit, from the time of committing the said act of bankruptcy, ceased to be the goods and chattels of the said John Barker, and then and there became and were unavailable for the purpose of levying thereout the said sums so indorsed on the said writ and directed to be levied as aforesaid, whereby the plaintiff was hindered and prevented from having the same sold under and by virtue of the said writ, as he otherwise might and would have had: By means of which said premises the plaintiff had been and was, not only greatly injured, and deprived of the benefit of his said writ, and of the means of obtaining the said monies so indorsed on the said writ and directed to be levied as aforesaid, and which were still wholly unpaid as aforesaid, and was likely to lose the same, but had also been put to great costs and expenses in and about endeavouring to compel the defendant to make a return to the said writ, and to pay the monies so indorsed on the said writ and directed to be levied as aforesaid, amounting to a further large sum of money, to wit, &c.

The defendant pleaded the general issue.

At the trial before Mr. Justice Gaselee, at the Sittings at Westminster after the last term, the facts that appeared in evidence were as follow:—on the 19th January, 1829, Barker, being indebted to the plaintiff in the sum of 146*l.* 5*s.*, executed to him a warrant of attorney in the penal sum of 260*l.*, upon which warrant of attorney jndgment by *nil dicit* was signed against Barker in the Court of King's Bench, at the suit of the plaintiff, on the 14th June, 1831, and on the same day a writ of *fieri facias* was issued thereon, tested the 13th June, and returnable the 3rd November following. This writ was delivered to the defendant on the 14th June; and, on the 16th, the sheriff took possession of Barker's effects, and continued in possession down

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to and after the return of the writ, at the request and for the accommodation of Barker. About six weeks after the levy, the officer wrote to the plaintiff's attorney, telling him that he was holding the goods at Barker's request: to which the attorney in answer stated that he (the officer) must use his own discretion in the matter, but that he should expect the sheriff to have the money ready to hand over on the return of the writ. The officer remained in possession, taking no steps to make the seizure available to the plaintiff, and being for a long time concealed up stairs in Barker's house, unknown even to his servants; and Barker in the mean time carried on his trade as before. Whilst the sheriff so remained in possession of the effects of Barker under the writ, and before its return, Barker committed several acts of bankruptcy; and, on the 5th October, 1831, a commission issued against him, under which he was declared a bankrupt. The act of bankruptcy upon which the commissioners adjudicated was committed on the 16th August. On the day the docket was struck notice was given to the sheriff. On the 6th October, the effects of Barker were taken possession of by a messenger under the warrant of the commissioners. The sheriff, however, continued to hold until the 9th January, 1832, when he withdrew upon receiving a bond of indemnity from one Plumstead Lloyd, the assignee appointed under the commission against Barker; and he afterwards returned *nulla bona* to the plaintiff's writ. The goods were sold by Lloyd, and realized a sum more than sufficient to satisfy the plaintiff's demand. The debt upon which the commission against Barker was taken out was a debt alleged to be due from him to one Barnes, as assignee of one Wright, a bankrupt.

The present action having been commenced, and notice given of the plaintiff's intention to dispute the trading of the bankrupt, the act of bankruptcy, and the petitioning creditor's debt, and the cause set down for trial on the

17th November, 1832, it was found that the debt due to Barnes was insufficient to support the commission against Barker, the debt upon which Wright's commission issued being incapable of strict legal proof. Lloyd, the assignee under Barker's commission, therefore, on the 28th November, 1832, petitioned the Court of Review, under the authority of the statutes (*a*), to substitute the debt proved by him under the commission (which amounted to 213*l.* 14*s.*), as the petitioning creditor's debt, in lieu of that of Barnes. This petition recited, amongst other things, that the debt of Barnes proved under the commission against Barker, and upon which the commissioners adjudicated him a bankrupt, was a debt due to Wright before his bankruptcy for goods sold and delivered by Wright to Barker on or about the month of October, 1826; that the petitioner (Lloyd) had proved a debt of 213*l.* 14*s.* under the commission against Barker, due to him as surviving partner of one James Davies deceased, for goods sold and delivered by them to Barker between the month of June, 1827, and May, 1828; and that, upon investigation into the debt of Barnes, upon which the commission against Wright was

(*a*) By the 6 Geo. 4, c. 16, s. 18, it is enacted, "that if, after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, may order the said commission to be proceeded in, and it shall by such order be deemed valid." And by the 2nd section of the 1 & 2 Will. 4, c. 56, it is enacted that the Judges of the Court of Review "shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said court of bankruptcy or elsewhere, except as is therein otherwise provided."

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founded, it had been discovered that the debt so alleged to be due to Barnes was insufficient in amount to support the said commission against Wright, and consequently that the debt of Barnes, as assignee of Wright, was insufficient to support the commission against Barker: the petitioner therefore prayed "that their honors would be pleased to order that the debt proved by the petitioner under the commission against Barker, not being anterior to the debt of Barnes, the petitioning creditor under the said commission, and being an existing and sufficient debt to support the said commission, might be ordered to be substituted for the debt of Barnes, and the commission against Barker declared to be valid, and directed to be proceeded with accordingly."

This petition came on to be heard in the Court of Review on the same day, when the following order was made:—

"Wednesday, 28th November, 1832.

"In the matter of John Barker, a bankrupt.

"Whereas Plumstead Lloyd, of &c., did this day prefer unto this Court his petition in the above matter, praying that the debt proved by the said petitioner under the commission against the said John Barker, not being anterior to the debt of Thomas Barnes, the petitioning creditor under the said commission, and being an existing and sufficient debt to support the said commission, might be ordered to be substituted for the debt of the said Thomas Barnes, and the said commission declared against the said John Barker to be valid, and directed to be proceeded with accordingly; and that the costs of all parties of and occasioned by that application might be paid out of the said bankrupt's estate: Now, upon hearing the said petition, and the affidavit of the said petitioner filed in support thereof read, and what was alleged by Mr. M. of counsel for the said petitioner, and by Mr. C. of counsel for the said John Barker, and Mr. J. of counsel for the said

Thomas Barnes, the petitioning creditor under the said commission of bankrupt awarded and issued against the said John Barker, appearing and consenting thereto; and this court finding and declaring that the debt of the said Thomas Barnes is insufficient to support the said commission, and that the debt of the said petitioner proved by him under such commission is not anterior to the said debt of the said Thomas Barnes, and is an existing and sufficient debt to support the said commission—it is ordered that the said debt so proved by the said petitioner under the said commission, as mentioned or referred to in the said commission, be substituted for the debt of the said Thomas Barnes, and that the said commission against the said John Barker be proceeded in accordingly.

" By the Court,

" W. B."

This order was not authenticated by any seal of the Court from whence it purported to emanate; but the letters " W. B." were proved to be in the hand-writing of Mr. William Barber, one of the registrars of the Court. It was thereupon contended, on the part of the plaintiff, that this order could not be received in evidence; and the case of *Muskett* v. *Drummond* (*a*) was cited. There, in an action by the assignees of B., a bankrupt, the plaintiffs produced an order made by the Lord Chancellor under the statute 6 Geo. 4, c. 16, s. 18, whereby, after reciting a petition to him by Muskett, he ordered, that, if the commissioners should be satisfied that Muskett had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in: and it was held that this was not a valid order, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. The

(*a*) 10 Barn. & Cress. 153.

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learned Judge, however, admitted the order to be read in evidence, subject to a motion.

It was also objected, on the part of the defendant—first, that this action was not maintainable against the sheriff—secondly, that there was no proof that the warrant of attorney which constituted the debt due to the plaintiff from the bankrupt, was filed in pursuance of the statute 3 Geo. 4, c. 39 (*a*), and, therefore, that the warrant of attorney was inoperative as against the assignees.

The learned Judge left it to the jury to say—first, whether or not the sheriff had any reasonable or probable cause for delaying to proceed to a sale of the goods of Barker—secondly, whether or not there was any *bonâ fide* debt due to Lloyd, the party whose debt was substituted under the order of the Court of Review—thirdly, whether or not there was any act of bankruptcy committed by Barker after the levy, viz. the 16th June, 1831—fourthly, whether or not Barker had been guilty of an act of bankruptcy before the levy.

The jury found that "there was no reasonable cause for the delay in the sale of the goods; that there was no *bonâ fide* debt due to Lloyd at the time of the bankrupt-

(*a*) Which enacts, "That if, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney [to confess judgment for securing the payment of money], a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution."

cy; that there was an act of bankruptcy committed before the levy, and no act of bankruptcy after the levy:" and they accordingly returned a verdict for the plaintiff—damages 116*l.* 5*s.*

Mr. Serjeant *Jones*, on a former day in this term, obtained a rule *nisi* that this verdict might be set aside, and a nonsuit entered, or a new trial had, on the grounds—first, that this description of action could not be maintained against the sheriff—secondly, that the warrant of attorney upon which the plaintiff's judgment against Barker proceeded was inoperative as against the assignees, it not having been filed in pursuance of the statute 3 Geo. 4, c. 39—thirdly, that the verdict was against evidence. The defendant also produced affidavits of surprise.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge* shewed cause.—1. Where the sheriff has seized goods under a *fieri facias*, and for an unnecessarily long period delayed to sell, and the debtor has in the mean time committed an act of bankruptcy upon which a commission is afterwards issued against him, whereby the fruits of his execution are lost to the judgment creditor, the sheriff is guilty of a breach of duty for which he is clearly responsible. In the present case, the possession of the officer was, upon the authority of *Doker* v. *Hasler* (*a*), altogether fraudulent and void. In Bacon's Abridgment (*b*), it is said: "The sheriff being obliged to execute every writ and process issuing and directed to him by lawful authority, he is likewise obliged by the duty of his office to execute such process with the utmost expedition, or as soon after he receives it as the nature of the thing will admit of. And herein there cannot be a surer rule for him to go by than a strict observance of what is injoined by the writ." Dalton, in his

(*a*) 10 J. B. Moore, 210; S. C. 2 Bing. 479. (*b*) Title "Sheriff," (N).

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office of sheriff, says (*a*): "The bailiff or other officer to whom any warrant shall be directed and delivered, ought with all speed and secrecy to execute the same." Again (*b*): "The sheriff or other officer to whom any writ or warrant shall be directed and delivered, ought with all speed and secrecy to execute his said writ or warrant according as the same commandeth: and besides he is bound to pursue the effect of his warrant in every behalf, or otherwise his warrant will not excuse him. In an action of debt, trespass, or the like, where the sheriff is to summon, attach, or garnish the defendant, the sheriff is to summon, attach, or garnish the defendant presently; and therefore, if in such cases the sheriff shall return *nihil habet*, without saying, *nec habuit die receptionis brevis*, or, *nec habuit post receptionem brevis;* yet it shall be intended that the sheriff endeavoured the execution thereof presently, to wit, the day of, or presently upon the receipt of the writ." From all the authorities it is clear that the sheriff is bound so to execute the process of the Courts as to render to the suitors the utmost and the speediest possible justice. Will it be contended that a sheriff, to whom mesne process had been delivered at the commencement of the long vacation, returnable (under the old practice) on the first return day of the Michaelmas Term following, might lie by until the last week the writ had to run, and then excuse himself by a return of *non est inventus*, although he could have taken the defendant at an earlier period, had he used due diligence? The antient return of *non est inventus* negatived the fact of the defendant's having been in the sheriff's bailiwick at the time of the delivery of the process to the sheriff, or at any time since, down to the time of the return. [Lord Chief Justice *Tindal*.—The return to the writ of *fieri facias*, that the sheriff has taken goods and chattels of the defendant to the value of the debt and damages,

(*a*) C. 21, p. 103. (*b*) C. 22, p. 109.

but that they remain in his hands unsold, for want of buyers, necessarily implies that he has made some attempt to sell.] The return negatives his having had the power to levy the debt during the whole time the writ had to run. If the sheriff, from his own wilful neglect, fails to have the money ready at the return of the writ, he is liable to the execution creditor for the consequences of his default: he is responsible for every neglect of duty or omission to execute duly the process of the Courts, where his conduct is without reasonable excuse. Is it to be in the power of the sheriff or other officer to put a judgment creditor to the hazard of a commission of bankrupt, or of an extent at the suit of the crown, attaching upon the property of his debtor, so as to render his judgment and execution utterly unavailable? Or, suppose the thing seized to be a valuable animal, is the creditor to be put to the peril of its death from the time of its seizure to the return of the writ? In the present case, the officer having been in possession of the debtor's goods for a period of six weeks, received from the plaintiff's attorney a letter calculated to urge him on to a sale: but he thought proper to disregard it. In *Carlile* v. *Parkins* (*a*), it was held that an action on the case is maintainable against a sheriff for wilfully, and without any reasonable or probable cause, delaying to sell the goods of the plaintiff which he had seized under a writ of *levari facias*. Lord Chief Justice Abbott there said: "I am of opinion, that, if the sheriff wilfully delays to sell for an unreasonable time, he is liable. If he abstain from pursuing the course of his duty, without any reasonable cause for the deviation, he is liable to an action; but, if there be a reasonable and probable cause for what he does, he is not responsible: this I take to be the law."

2. There was no evidence offered at the trial to shew that the warrant of attorney, upon which the plaintiff's

(*a*) 3 Stark. Rep. 163.

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judgment against Barker was entered up, was not filed in pursuance of the statute 3 Geo. 4, c. 39. At all events, it was not competent to the sheriff to take the objection. [Lord Chief Justice *Tindal*.—It is good ground of defence on the part of the sheriff, that the plaintiff has sustained no damage, having no available debt due to him from Barker.] The *onus* of shewing the warrant of attorney not to be filed, was upon the defendant. [Mr. Justice *Alderson*.—Supposing the commission to be supported, the words of the act seem to imply that it lies upon the party who sets up the warrant of attorney to prove that which is necessary to its validity.] There is no direct authority upon the subject to be found; but the decisions upon the annuity acts bear a strong analogy; and, in those cases, it has always been held, on grounds of public convenience, that proof of the inrolment, which the statutes require to validate annuities, should not be required to be given by the party who sets up the annuity, but that the fact of inrolment must be negatived by him who seeks to impeach it—*Doe* d. *Griffin* v. *Mason* (*a*)—*Doe* d. *Lewis* v. *Bingham* (*b*).

3. The order of the Court of Review, for the substitution of the debt of Lloyd for that of Barnes as the petitioning creditor under the commission against Barker, even if authorized by the statutes, was not receivable in the present case. The order was procured after the day for which notice of trial had been given, without notice to the parties to be principally affected by it; and it stated no ground for the substitution, and was not authenticated, as all judicial acts of a Court must be—under seal. It never could have been the intention of the legislature that the rights of a party should be taken from him in his absence by so loose a proceeding; or that he should be made a wrong-doer, when his act was perfectly legal at the time it

(*a*) 3 Camp. 7. (*b*) 4 Barn. & Ald. 672.

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was done. The words of the clause "found insufficient," must mean, that, before the order for the substitution is made, the original debt must have been *judicially* found insufficient before some competent tribunal. It could only have been intended to operate upon the subordinate jurisdiction, viz. the court of commissioners; and to enable them to proceed as to proofs already made, and other ministerial acts done under the commission. In order to make the substitution sufficient to support the commission, the Courts would be bound to give effect to it without investigating the substituted debt (*a*). Besides, the clause supposes an adverse application; not a pre-concerted arrangement, as here. In *Muskett* v. *Drummond*, where an order under this provision of the statute had been made by the Lord Chancellor, and its propriety was much discussed, though no decision took place upon the point, Mr. Justice Bayley, in delivering the judgment of the Court, said (*b*): "The Lord Chancellor's order says nothing as to the insufficiency of the debt; but, upon reading the affidavit, hearing counsel for Muskett, and the other assignees of Taylor, and the petitioning creditor's consenting thereto, it orders, that, *upon the commissioners being satisfied as to Muskett's debt*, and the time it was contracted (as to which *the commissioners were afterwards satisfied*), the commission should be proceeded in. It does not appear that the Lord Chancellor was apprized, when he made the order, of the existence of the present suit, so as to call his attention to the propriety of making any provision as to giving it in evidence in this suit. No notice of the application to the Lord Chancellor

(*a*) It may not be immaterial here to advert to the language of the 92nd section of the 6 Geo. 4, c. 16, which, in a given event, makes the depositions taken by the commissioners *conclusive evidence* of the matters therein contained, in *all* actions at law or suits in equity brought by the assignees.

(*b*) 10 Barn. & Cress. 161.

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appears to have been given to the defendant, against whom this suit was pending, so as to give him an opportunity of interposing in the Court of Chancery to prevent its being improperly used to his prejudice." There, the Lord Chancellor directed the commissioners to inquire into the sufficiency of the substituted debt; whereas, here, it seems to have passed without the slightest investigation. It is suggested to the Court of Review that Lloyd has proved a debt under the commission of a sufficient amount; and they order that the debt *so proved* shall be substituted.

The 28th section of the statute 1 & 2 Will. 4, c. 56, provides that the Court thereby called into existence shall have a seal (*a*). [Mr. Justice *Alderson* referred to the 2 & 3 Will. 4, c. 114, s. 9, which enacts that proceedings in bankruptcy purporting to be *sealed with the seal of the Court* are to be received as evidence.] The sealing is the only mode of authenticating a decree or order of any Court having a seal. In *Alves* v. *Bunbury* (*b*), in an action on a foreign judgment, it was held that the judgment produced at the trial must be authenticated by the seal of the foreign court, or evidence must be given that the court has no seal, in which case the judgment may be established by proving the signature of the Judge. [Mr. Justice *Gaselee* referred to *Cavan* v. *Stewart* (*c*), where it was held, that, if a colonial court possess a seal, it must be used for the purpose of authenticating a judgment of the court, although it is so much worn as no longer to be capable of making an impression.]

The commission against Barker did not follow within two months after the levy; and therefore, upon the autho-

(*a*) On the part of the plaintiff, an affidavit was produced, stating it to be the practice of the Court of Review to issue these orders under seal.

(*b*) 4 Camp. 28.

(*c*) 1 Stark. Rep. 525. And see *Henry* v. *Adey*, 3 East, 221; S. C. 4 Esp. Rep. 228. *Buchanan* v. *Rucker*, 1 Camp. 63.

rity of the case of *Godson* v. *Sanctuary* (*a*), the plaintiff was entitled to the fruits of his execution.

Mr. Serjeant *Jones* and Mr. Serjeant *Stephen*, in support of the rule.—1. It is the duty of the sheriff to execute all process delivered to him according to its exigency. By the writ of *fieri facias*, he is commanded to have the money in Court on the return day: but he is not bound to sell *instanter*, as is here contended. The law has provided an appropriate remedy where the sheriff seizes and neglects to sell, viz. by *venditioni exponas*. In *Cameron* v. *Reynolds* (*b*), Lord Mansfield says: "The legal and proper mode of compelling a sale by the sheriff, where he makes delay, or refuses, is, by writ of *venditioni exponas*; upon which he must return the money into Court." The case is different where the sheriff has sold: the proceeds then become money had and received to the use of the execution creditor. In *Carlile* v. *Parkins*, the party who brought the action (the owner of the goods) had been injured by the sheriff's remaining in possession an unreasonable time.

2. The judgment upon which the plaintiff's execution against Barker was sued out, was admitted to be founded upon a warrant of attorney; and there was no proof that this warrant of attorney, or a copy, had been filed within the time and in the mode prescribed by the statute 3 Geo. 4, c. 39. As against Barker's assignees, therefore, the warrant of attorney and the judgment thereon were wholly inoperative; and consequently the plaintiff has no right of action against the sheriff: for, whatever destroys the claim of the plaintiff as a judgment creditor of Barker, affords good ground of defence to the sheriff in this action—the plaintiff being only entitled to recover to the extent that he can prove himself to have been injured by the act or

(*a*) 1 Nev. & Man. 52. (*b*) Cowp. 406.

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default of the defendant. [Lord Chief Justice *Tindal*.—The question is, upon whom did the *onus* of proof as to the filing rest. The objection that the warrant of attorney was not filed comes from the defendant: suppose he had pleaded it, would not the burthen of proof have been cast upon him?] The statute says, that, unless a certain act be done, the warrant of attorney shall be deemed fraudulent and void against the assignees (under a subsequent bankruptcy) of the party giving it: it therefore lies upon the party setting it up to prove that every thing requisite to its validity has been done by him. The object of the statute was, to guard against a common fraud, that of creditors obtaining warrants of attorney that were never intended to be put in force, but merely given to protect the property of the debtor against a subsequent commission of bankrupt. The cases decided upon the annuity acts bear no analogy to the present.

3. It has been contended that the order of the Court of Review, by which the debt of Lloyd was substituted for that of Barnes, as the petitioning creditor's debt upon which the commission of Barker was to be supported, is not binding upon one who is not a party to it; who has had no notice of it; and who has brought an action, wherein he seeks to impeach the validity of the commission, before the making of the order. The 18th section of the 6 Geo. 4, c. 16, does not require any notice to be given; and care is taken by the legislature that the substituted debt shall not be anterior in point of date to the former petitioning creditor's debt, so as to alter the relation. The words "found insufficient," that have given rise to so much discussion, are not used in a technical sense: they mean only that it shall be made to appear to the satisfaction of the Lord Chancellor or of the commissioners. Under the present administration of the bankrupt laws, the Court of Review alone are to judge, from the facts submitted to them, of the propriety of making the order: their order

concludes the matter. It is not competent to this Court to call in question the decision of the Court of Review. In *Muskett* v. *Drummond*, the Court of King's Bench declined to decide this very point.

The two months' protection under the 108th section of the 6 Geo. 4, c. 16, does not apply where the execution is void, as here, by reason of the warrant of attorney not being duly filed in pursuance of the 3 Geo. 4, c. 39.

Lord Chief Justice TINDAL.—This was an action on the case, brought by a judgment creditor of the bankrupt, Barker, who claims a debt under a warrant of attorney, against the sheriff, for misconduct in the execution of a writ of *fieri facias* issued upon that judgment. The defence was, that the goods in question had ceased to be the property of the bankrupt, and had become the property of his assignees, to whom they had been given up by the sheriff under an indemnity, and who defended the action in the sheriff's name. Notice had been given by the plaintiff, under the 90th section of the 6 Geo. 4, c. 16, of his intention to dispute the petitioning creditor's debt, the trading, and the act of bankruptcy; and it therefore became necessary for the defendant to shew the commission against Barker to be valid. It appeared that the commission issued on the 5th October, 1831, on the petition of one Barnes. The writ of *fieri facias* at the suit of the plaintiff had been delivered to the sheriff on the 14th June preceding, and the sheriff remained in possession of the goods of Barker from the 16th June until long after the issuing of the commission. The debt upon which it was awarded was due to Barnes as the assignee of one Wright, a bankrupt, to whom it was alleged that Barker was indebted in the sum of 108*l.* 19*s.* 8*d.*, for malt sold and delivered. After the present action was brought, and notice of trial given for the 17th November, 1832, the defendant discovered that the debt upon which the com-

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mission against Wright was founded was not sufficient to sustain it; and consequently that the debt to Barnes, as assignee of Wright, upon which the commission against Barker had issued, was insufficient to support that commission. The assignee and the petitioning creditor (Barnes), without the knowledge of the plaintiff in this action, applied to the Court of Review, and procured an order under the statutes 6 Geo. 4, c. 16, s. 18, and the 1 & 2 Will. 4, c. 56, s. 2, to substitute another petitioning creditor's debt, viz. that of Plumsted Lloyd. This substitution of a new debt, of which the plaintiff had never before heard, was undoubtedly a great surprise upon him; and, had the verdict been against him, it would certainly have been sufficient ground for a new trial. He had come prepared to contest Barnes's debt: but the line of his operations was thus suddenly turned, and another debt unexpectedly set up. The first objection that has been urged on the part of the plaintiff against the rule that has been obtained by the defendant, is, that the latter had no right to avail himself of the order of the Court of Review, unless he was prepared to substantiate the grounds upon which that Court proceeded. Upon this point I entertain a strong opinion, and, when called upon, I shall be prepared to pronounce it; but the judgment we have formed upon the other parts of the case renders it unnecessary now to decide that point. The order was admitted, subject to the objection, and the cause proceeded. One of the questions that arose was, whether or not the substituted debt was a *bonâ fide* debt: this the jury have expressly negatived. The rule for a new trial has been obtained partly upon objections in point of law, and partly on the ground that the defendant was surprised by evidence offered on the part of the plaintiff. It is unnecessary to give any opinion except as to whether we are satisfied with the verdict, and whether we see sufficient to induce us to believe that the defendant has been surprised to such a de-

gree as to entitle him to have the cause a second time investigated. On neither pretence am I disposed to disturb the verdict. This determination removes the necessity for going into many of the points that have been discussed at the bar. It may, however, be convenient to dispose of one of them.

It has been said that the plaintiff has no place in Court, and is not entitled to maintain the present action, because the warrant of attorney upon which his judgment was signed and execution issued against Barker, was not shewn to have been filed within twenty-one days after its execution, pursuant to the statute 3 Geo. 4, c. 39. It appears to me, however, that, unless the defendant had shewn that there was a valid commission existing against Barker, this objection cannot be urged against the plaintiff. The act says "that if, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission." It seems to me that the warrant of attorney is not by this clause made void to all intents, and as against all persons, if not filed within the prescribed period; but it is void only as against assignees under a commission issued against the party—that is, such a commission as can be supported. As there is no good petitioning creditor's debt, the assignees chosen under the commission are not legally and properly assignees within the meaning of this enactment, and

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therefore this objection cannot be set up to impeach the judgment creditor's debt. It therefore comes round to the question whether or not the debt of Lloyd was *bond fide*, and sufficient to support the commission against Barker. The jury did not think fit to believe the witnesses that were called to establish it; and I think there was abundant room for suspicion, and therefore am not dissatisfied with their verdict.

Mr. Justice PARK.—Several points have been argued in this case which it is not necessary for us to decide, whatever opinions we may entertain upon them. It is enough for me to say, that I am satisfied with the finding of the jury that there was no good petitioning creditor's debt. With regard to the question as to the filing of the warrant of attorney upon which the plaintiff's judgment proceeded, I agree with my Lord Chief Justice, that, to enable him to contest that, the defendant must put himself in the situation required by the 3 Geo. 4, c. 39. As to the order of the Court of Review for the substitution of a new petitioning creditor's debt—it is a novelty in the bankrupt laws, and certainly does seem to impose a most intolerable hardship upon parties. The defendant having received notice of the plaintiff's intention to dispute the commission against Barker, and finding that it could not be supported upon the debt of Barnes, goes into the Court of Review, behind the backs of those really interested, and procures another debt to be substituted. This is a power that ought to be most carefully watched. Though the question is not now ripe for decision, I cannot help repeating the words of Mr. Justice Bayley in the case of *Muskett* v. *Drummond* (*a*): "The Lord Chancellor's order does not import that the debt had been found insufficient before the petition was presented to him; he pronounces nothing

(*a*) 10 Barn. & Cress. 161.

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as to its sufficiency; and there is no fair ground for presuming that he examined into its sufficiency. The petition does not pray that he should. The order is made *upon the consent* of Muskett and the assignees on the one hand, and the petitioning creditor on the other: the defendant against whom it is to operate is no party to it, and does not appear to have known of it until it was produced against him on the trial. Without entering, therefore, into the question how far an order by the Lord Chancellor, where he pronounced upon the insufficiency of the original debt, or where such debt had otherwise been judicially found insufficient, would operate upon a depending suit, especially against a party who had no notice of such order, and was not apprized that he would have to meet the substituted debt, we are of opinion that the order in this case is insufficient for that purpose." Surely, before such substitution of a new petitioning creditor's debt is permitted, it is very fit that some inquiry should take place before a competent tribunal, in order that the rights of third parties may not suffer.

Mr. Justice GASELEE.—I see no reason why this cause should be sent down again. At the trial, finding that there were several points both of law and of fact, I thought it better to sum up each to the jury, and get their finding specifically upon each. The order of the Court of Review substituting the debt of Lloyd for that of Barnes, very much resembles the order in *Muskett* v. *Drummond*. But the great blot in the order in that case is upon the face of this order avoided by the introduction of the words—"this Court *finding and declaring* that the debt of the said Thomas Barnes is insufficient to support the said commission, and that the debt of the said petitioner (Lloyd) proved by him under such commission is not anterior to the said debt of the said Thomas Barnes, and is an existing and sufficient debt to support the said commission—it is order-

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ed, &c." It is not necessary upon this occasion to give any opinion upon the subject of this order. Still, I must observe that there does not appear to have been any more evidence given before the Court of Review upon obtaining the order, than was given before the Lord Chancellor when he pronounced the order mentioned in *Muskett* v. *Drummond*. All that appears is, that Lloyd presented a petition, supported by *an* affidavit, praying that the debt proved by him under the commission against Barker might be substituted for that of Barnes, the original petitioning creditor, it having been discovered that Barnes's debt was insufficient to support the commission; that, on the petition being presented, Lloyd was heard by counsel; that counsel appeared for the bankrupt, and also for Barnes, and severally consented to the making of the order. The inconvenience and injustice that are likely to result from this power of substitution, supposing it to be properly and legally exercised, are well illustrated by this case. The action is brought against the sheriff for not selling goods seized by him, and subsequently claimed by the assignees under a supposed commission of bankrupt against the debtor. The plaintiff gives notice of his intention to dispute the validity of the commission. Notice of trial is given, and the cause set down. If the cause had then been tried, the plaintiff must have had a verdict, the then petitioning creditor's debt being confessedly bad. A day or two before the trial, however, a new petitioning creditor's debt is substituted, of which the plaintiff could have had no previous notice, and could not be prepared to contest: and so he runs the risk of losing the verdict.

Mr. Justice ALDERSON.—I concur on the points stated by my Lord Chief Justice, viz. that it was necessary for the defendant to prove a good petitioning creditor's debt and a valid commission before he could be permitted to contest the ground of the plaintiff's judgment; that there

is no pretence for dissatisfaction at the finding of the jury; and that there was no such surprise upon the defendant at the trial as to entitle him to a second inquiry. The statute 3 Geo. 4, c. 39, only makes a warrant of attorney, when not filed pursuant to the directions of that act, fraudulent and void as against the assignees under a commission afterwards taken out against the debtor. I agree that that must mean such a commission as can be supported. The question, therefore, could not arise here, there being no good petitioning creditor's debt.

Rule discharged.

POND *v.* DIMES.

Thursday, April 25th.

The Court permitted the examination of a witness before the Prothonotary, under the statute 1 Will. 4, c. 22 (on payment of costs), upon the affidavit of his medical attendant, who swore that he was in a *precarious* state, and could not attend at the trial without great danger.

MR. Serjeant *Storks*, on the part of the defendant, on a former day, obtained a rule calling on the plaintiff to shew cause why the evidence of one Outhwaite should not be taken *vivâ voce* before the Prothonotary, and why such examination, to be certified under the hand of the Prothonotary, should not be read and given in evidence on the trial of the cause, saving all just exceptions thereto, pursuant to the statute 1 Will. 4, c. *22*. The motion was founded upon the affidavit of a surgeon, who deposed that he had attended the witness professionally for eight or nine months last past; that he had been for some time past seriously ill, and his life was then *in a very precarious state;* and that his confinement in a crowded room or Court of law, for even a short period, might, in the judgment of the deponent, be attended with the most fatal consequences to the witness.

Mr. Serjeant *Wilde, contrà*, submitted that the affidavits did not disclose a case for the interference of the Court; and that, to dispense with the personal attendance of a

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witness before the Court and jury, the affidavit should be such as to satisfy the Court that a positive danger would be likely to be incurred by the witness if compelled to appear.

Lord Chief Justice TINDAL.—Applications of this nature certainly are not to be lightly entertained: but, as the affidavit of the medical attendant of the witness states his life to be in a very *precarious* state, I think we may allow the examination, although perhaps the case is barely brought within the statute, on payment of costs.

Mr. Justice ALDERSON.—The examination will not prejudice the opposite party: it will be only *de bene esse;* for, by the 10th section of the statute, it is enacted "that no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable, from *permanent* sickness, or other *permanent* infirmity, to attend the trial."

The rest of the Court concurring—

Rule absolute, on payment of costs (*a*).

(*a*) See *Abraham* v. *Norton*, *ante* Vol. 1, p. 384, where the Court refused to grant an order for the examination before the Prothonotary (pursuant to the statute) of a female witness, upon an affidavit that the cause was set down for trial at the Sittings after Hilary Term, and that the witness was expected to be confined in the month of February or March, and therefore would be unable to attend.

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WRIGHT *v.* WARREN.

Thursday, April 25th.

A motion to set aside the service of a writ of *summons* on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the *distringas* is issued, must be made within a reasonable time after the service thereof.

Semble, that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier.

MR. Serjeant *Talfourd*, on the 17th instant, obtained a rule *nisi* that the service of the writ of *distringas* in this case might be set aside for irregularity, on the grounds, among others, that the name of the attorney by whom the writ of *summons* had been sued out was not properly indorsed thereon, and that the writ of *summons* had been issued into the county of Middlesex, and the *distringas* into London.

Mr. Serjeant *Wilde* now shewed cause, on an affidavit which stated that the writ of *summons* was served upon the 30th of March. He therefore submitted that the application was made too late; referring to rule 33, Hilary Term, 2 Will. 4, which provides that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

Mr. Serjeant *Talfourd*, in support of his rule, submitted that the writ was a nullity, the requisitions of the statute as to the indorsements not having been complied with (*a*).

Lord Chief Justice TINDAL.—By rule X of Michaelmas Term, 3 Will. 4, it is ordered, "that, if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act (*a*) to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application

(*a*) See the statute, 2 Will. 4, c. 39, s. 12.

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to be made to the Court out of which the same shall issue, or to any Judge." The writ in this case therefore is not void. That which is complained of is a mere irregularity; and then the question comes round to the 33rd rule of Hilary Term, 2 Will. 4, which provides that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time. Can we say that the application is made within a reasonable time, when the writ of *summons* is served on the 30th March, and the rule to set aside the service is not moved for until the 17th of April? I am clearly of opinion that the motion was too late, and therefore that the rule must be discharged, with costs.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—Rule X of Michaelmas Term, 3 Will. 4, is not imperative.

Mr. Justice ALDERSON.—According to the statute, the *distringas* must go to the *place of abode* of the defendant. The writ of *summons*, however, may issue into any county where the party may reside or *be*.

Rule discharged, with costs.

Friday, April 26th.

COCKS *v.* NASH.

The Court will not on motion compel a person not a party to the suit, to produce for inspection a deed which he holds as a mere trustee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it.

Nor will the Court exercise their authority in this respect over an attorney, where the deed has not come into his hands by virtue of his professional character.

MR. Serjeant *Adams*, on the part of the defendant, in the last term, obtained a rule calling upon the plaintiff

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and Mr. James Hammond, a solicitor, to shew cause why the plaintiff should not produce on the trial of this cause a certain indenture of assignment and release dated the 17th February, 1827, made between Mary Nash, of the first part, the said James Hammond and the plaintiff, creditors of Mary Nash, of the second part, and the several other creditors of Mary Nash executing the said indenture, of the third part, being a conveyance of the real and personal estate of the said Mary Nash to the said James Hammond and the plaintiff, in trust for the said Mary Nash, and in which deed was contained a general release to the said Mary Nash by the plaintiff and the several other persons creditors of Mary Nash executing the same; and why the plaintiff should not, in the mean time, produce the said deed of assignment and release to the defendant's attorney for inspection, and allow a copy thereof to be taken: and why the said James Hammond (one of the attornies of this Court), upon notice to him or his agent, should not produce on the trial of this cause the said indenture of assignment and release; and why he should not, in the mean time, produce the said deed of assignment and release to the defendant's attorney for inspection, and allow a copy thereof to be taken: and why, in default of the production of the said original deed of assignment and release on the trial by the plaintiff or the said James Hammond, a copy thereof, the same being proved to be a true copy of the said original deed of assignment and release, should not, on the trial, be admitted and received as evidence of the said original deed: or why, in case default should be made either by the plaintiff or by Hammond, in producing the deed on the trial, and in the mean time producing the same for inspection and allowing a copy thereof to be taken as aforesaid, a certain extract of the said deed should not be admitted and received as evidence of the release by the plaintiff to the said Mary Nash, as one of her creditors, in the said indenture of assignment and release.

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The motion was founded upon affidavits stating, that, at the trial of the cause at the last assizes at Shrewsbury, Mr. Hammond had been subpœnaed on the part of the defendant to produce the deed; that, on his cross-examination, he admitted that he had it in his possession, and had received the authority and direction of Mrs. Mary Nash, the releasee, to produce it, but objected to do so on the ground that other persons, creditors of Mary Nash, were interested under it, and he had no authority from them to produce it; and that the learned Judge who tried the cause held that Mr. Hammond was not bound to produce the deed, and consequently it was not produced, and the defence failed.

Mr. Serjeant *Wilde* (for the plaintiff), and Mr. Serjeant *Coleridge* (for Mr. Hammond), now shewed cause, upon an affidavit of the plaintiff, that the deed was not in his possession or under his control; and an affidavit of Mr. Hammond, who swore that he was not the attorney of either of the parties; that the deed in question had come to his hands merely in the character of a trustee for Mrs. Nash and her creditors; and that the deed was executed by the defendant upon the express understanding that it should not enure to the discharge of defendant's liability as surety for Mrs. Nash.—The grounds upon which the Courts of law will interfere to compel the production of instruments in favour of parties claiming to be interested under them, are very fully laid down in the case of *Ratcliffe* v. *Bleasby* (*a*). There, the plaintiff and defendant being about to enter into partnership together, a draft of an agreement was prepared by the defendant's attorney, which having been perused and approved of by the plaintiff's attorney, was engrossed, and executed by the defendant, but was not executed by the plaintiff. The plaintiff afterwards brought an action

(*a*) 10 J. B. Moore, 523; S. C. 3 Bing. 148.

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against the defendant for a breach of the agreement for the partnership, and applied for leave to inspect and copy the draft and deed. The Court refused the application, on the ground that the plaintiff, not having executed the deed, had no interest in it. The rule there laid down is, that, to entitle the applicant to have an inspection, he must be a party to the deed. Here, the defendant is no party to the deed, though the Court has held, that, by operation of law, he is affected by it (*a*). The latter part of the rule, which prays that secondary evidence of the deed may be admitted upon the next trial, at all events cannot be granted. Hammond is no party to the cause: nor does he stand in the situation of a trustee for the defendant. Hammond is not, therefore, subject to the jurisdiction of the Court: he could not be compelled by an order of this Court to produce the deed at the trial. The defendant must apply to a Court of equity; and even there he would obtain no relief, for, the production of the instrument would not be enforced there, because the release, in equity, does not discharge the defendant. It is suggested that Mr. Hammond is amenable to the jurisdiction of the Court, being an attorney: but, at the time the instrument in question was prepared and executed, he was not an attorney of this Court. Besides, before the Court can exercise their authority over an attorney, it must be shewn that he has in the particular matter acted in his character of attorney. [Mr. Justice *Alderson*.—In *Ex parte Aitkin* (*b*), Lord Chief Justice Abbott said: "The rule by which the Court are to be governed in exercising this summary jurisdiction over its officers seems to me to be this: where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to exe-

(*a*) See *Cocks* v. *Nash*, *ante*, Vol. 2, p, 434; S. C. 9 Bing. 341.
(*b*) 4 Barn. & Ald. 47.

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cute faithfully the trust reposed in him. But, where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." That was the first case that enlarged the rule; and it has since been much doubted, but never I believe over-ruled.]

Mr. Serjeant *Adams* and Mr. Serjeant *Talfourd*, in support of the rule.—Hammond is a trustee for the defendant. In his own affidavit, he admits that he is a trustee for Mrs. Nash; and the Court, in Michaelmas Term last, decided that the release applied also to Folliot Nash, the defendant: Hammond is therefore trustee for both. [Mr. Justice *Alderson*.—In the case of *Cocks* v. *Nash*, in last Michaelmas Term, we decided that *a* release to Mrs. Nash of a joint debt due from her and the defendant, operated in law as a release of both. How do we know (it not appearing on the affidavits) that that release and the release which is the subject of this motion are one and the same release?] In *Blakey* v. *Porter* (*a*), it was held, that, if one part only of an indenture is executed, the Court will compel the party having the custody of it to produce it for inspection, upon an action commenced against himself by the other party. Sir James Mansfield there said: "Of what use would the defendant's covenant be, if the plaintiff could not get access to it? Parties, in order to save the expense of double stamps, are unwisely content to execute one part only of an indenture. Is it not, however, the necessary consequence of this practice, that the party who has the custody undertakes to produce the deed when wanted, for the use of both?" In *Bateman* v. *Phillips* (*b*), it was decided that the Court has power to compel the production by a defendant of an unstamped agreement in his

(*a*) 1 Taunt. 386. (*b*) 4 Taunt 157.

custody, to which the plaintiffs claim to be parties in interest, upon the instance of the plaintiffs, in order that they may get it stamped; although the plaintiffs were not parties to it, and although their interest no otherwise appeared than upon their own declaration, which proved a claim, but not an interest. And Mr. Justice Heath, during the argument, observed that the rule restraining the production of instruments to the application of a party named therein, was much too strict; for, suppose a person, though no party to a deed, took an estate by way of remainder, he had nevertheless a strong interest in the deed, and was entitled to compel the production. In the case of a copyholder, it is sufficient to enable him to obtain an inspection of the court rolls, that he claims an interest under them; it is not necessary to shew by affidavit that he has an interest. In the present case, however, the defendant is clearly (as appears from the recent decision of the Court in this case) a party interested under the deed, and therefore is, upon every principle, entitled to have it produced, in order to enable him to make his defence.

Lord Chief Justice TINDAL.—This is a rule calling upon the plaintiff, and also upon a Mr. Hammond, who is alleged in the affidavits upon which the motion was founded to be a trustee for the plaintiff and defendant, to shew cause why the plaintiff should not produce on the trial of this cause a certain indenture of assignment and release, and why he should not in the mean time produce the same to the defendant's attorney for inspection, and allow a copy thereof to be taken; and why Hammond should not produce the same deed on the trial, and in the mean time produce it to the defendant's attorney for inspection, and allow a copy thereof to be taken; and why, in default, a copy thereof, or an extract therefrom, should not be received as evidence of the original deed. It appears to me, that, as far as the plaintiff is concerned,

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the application has altogether failed. The deed is not in his custody, but in that of Hammond. With regard to Hammond, the first answer that occurs is, that he is no party to the suit. He may be compelled by *subpœna duces tecum* to produce the deed, provided it be a deed which by law he is bound to produce. But, if we were to take upon ourselves to decide the question upon motion, we should thereby deprive the party of his right to appeal: because, if on the trial the Judge should refuse to receive secondary evidence of the contents of the deed, the defendant may tender a bill of exceptions. It is contended on the part of the defendant, that Hammond must be taken to be a trustee for him; and that he is therefore bound to produce the deed. But no authority has been cited to shew that one not a party to the suit, and in nowise interested except as a mere trustee, can be compelled by a summary application like the present to produce an instrument in his hands. I am not for enlarging to that extent the rule upon the subject. On that short ground, therefore, it seems to me that the motion as to Hammond also fails.

It is not, however, by any means clear that Hammond does hold the deed as a trustee for the defendant. The defendant was not originally a debtor to the plaintiff. He became indebted merely as surety for his mother. It does not follow, that, because Hammond is trustee for Mrs. Nash, the principal debtor, he is also a trustee for the surety. To hold that he is, would, I think, be carrying the doctrine further than is warranted by the decided cases. But, suppose Hammond is a trustee for the defendant as well as for Mrs. Nash, enough appears on the face of the affidavits to shew that this is not a case in which the Court would feel disposed, in the exercise of their equitable jurisdiction, to assist the applicant. We must understand the word trustee in the same sense that a Court of equity would understand it: and it is perfectly clear that

a Court of equity would not, under the circumstances detailed in Hammond's affidavit, allow this release to be set up as a release of the defendant, the surety. It would, therefore, be contrary to justice in the Court to afford the defendant any facility in availing himself of a defence which he is not equitably entitled to set up. It has been further contended that Hammond is an officer of the Court, and, as such, subject to its summary jurisdiction. I think, however, we are bound by the authority of *Ex parte Aitkin*, referred to by my brother Alderson in the course of the argument. To warrant the Court in exercising its authority, to compel an attorney to produce documents in his possession, it must appear that he was intrusted with them solely in reference to his character of an officer of the Court; not, as here, where that character has supervened upon him at a period subsequent to his employment, and where he holds the deeds in a character quite distinct and independent of that of an attorney. I therefore think the rule must be discharged.

Mr. Justice PARK.—It is but eight years since this subject was fully discussed in this Court, in the case of *Ratcliffe* v. *Bleasby*, when all the authorities were cited, and the rule, as it seems to me, very accurately laid down. The matter next came before the Court in *Rowe* v. *Howden* (*a*), where, in an action by the owners of a ship against a broker employed by them to procure a cargo, the Court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, as far as it related to the plaintiff's ship, although the defendant acted as such broker at the time. The rule laid down in these cases has been invariably acted upon at chambers ever since. It is not every officer of the Court that is bound to produce documents that have

(*a*) 1 Moore & Payne, 334; S. C. 4 Bing. 539.

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come into his possession in his professional character. Lord Kenyon, on one occasion, refused to permit an attorney to be called upon to produce documents that had come into his possession as solicitor to a commission. But the strong ground upon which I concur with my Lord Chief Justice in thinking that this rule should be discharged, is, that the effect of our granting the application would be to preclude the party from taking the course which the law has provided at *Nisi Prius*. If the Judge shall then think fit to reject secondary evidence of the deed, it will be open to the defendant to tender a bill of exceptions.

Mr. Justice GASELEE.—I am also of opinion that this rule should be discharged. The application is to the discretion of the Court. We have already on one occasion decided upon the legal effect of the deed of release. But I do not think we ought to prevent the plaintiff from trying the question in a Court of equity.

Mr. Justice ALDERSON.—I am of the same opinion. If we were to accede to the prayer of this motion, we should run a great risk of doing gross injustice to the plaintiff. If the parties are obliged to go to a Court of equity, they may there take an issue which will decide the question one way or the other. The rule upon which the Courts of law have hitherto proceeded, in cases where they have compelled parties to produce documents in their possession for inspection in a cause, is this: where both were originally interested in the instrument, and there is only one part of it in existence, and that is in the hands of one, its production will be enforced, in order that the suit may proceed; as, where it is in the possession of the defendant, to enable the plaintiff to declare on it; or, where it is in the hands of the plaintiff, to enable the defendant to plead: and the reason of the rule is, that the parties may not be prevented from putting the cause in course of trial. In

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the present case, however, the inspection of the supposed release is not required by the defendant in order to enable him to plead; for, the parties are already at issue. The defendant may call upon Mr. Hammond, by a *subpœna duces tecum*, to produce the deed at the trial. The Judge will then compel him to produce it if the law allows it. This, however, is not the proper Court to determine that question. It therefore appears to me that under no circumstances could we grant this application. I agree with my Lord Chief Justice that this Court has no power over a trustee, as such: he is amenable only to a Court of equity. If in this case an application were made to a Court of equity, and the facts be as they are stated in Hammond's affidavit, that the release was at the time of its execution understood as not being intended to enure to the discharge of the present defendant, Hammond would not be compelled to produce it for the defendant's inspection. In this Court we have held that the release of the principal debtor, Mrs. Nash, operated in law as a release of the defendant, as surety; and that the parol agreement that it should not so operate afforded no answer at law to the deed. In equity, however, it would be an answer, if the fact were so. Courts of equity proceed upon their own specific grounds as to trustees.

With regard to the professional character of Mr. Hammond—I have yet to learn that the Courts will interfere summarily, except on the part of a client, or of one claiming under a client of the attorney, where the instrument has not come to his hands in his character of attorney.

Rule discharged, with costs.

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Saturday, April 27th.

The costs of the applicant under the interpleader act, where he has acted *bonâ fide*, will in the first instance be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful.

DUEAR *v.* MACKINTOSH.

THIS was a motion under the interpleader act, 1 & 2 Will. 4, c. 58. The debt for which the action was brought was claimed by two parties. The defendant prayed for costs.

Lord Chief Justice TINDAL.—It seems to me that the better course for us to pursue with respect to costs would be to follow, as nearly as possible, the practice of the Courts of equity. There, where it appears that all parties have acted properly, the fund is charged with the costs. I therefore think that in this case the fund should, in the first instance, be charged with the defendant's expenses of the motion. We cannot throw the costs upon either of the contending parties, inasmuch as it is not yet ascertained which is in the wrong.

Mr. Justice PARK.—I see no objection to the fund being charged in the first instance: the party who may ultimately turn out to be wrong paying the costs eventually.

The rest of the Court expressing no dissent—

Rule accordingly (*a*).

(*a*) And see *Cotter* v. *The Bank of England*, *post*, p. 180.

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W. & T., partners, were indebted to the plaintiff, and, after the dissolution of the partnership, T. also became indebted on his separate account to the plaintiff:—*Held*, that, in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items.

SMITH *v.* WIGLEY and TUNNICLIFFE.

THIS was an action of assumpsit brought by the plaintiff, a news vender, against the defendants, news agents at Co-

ventry, for the price of newspapers supplied to them. The particular of demand delivered by the plaintiff was as follows:—

	£	s.	d.
Bill delivered to 14th January, 1831	84	10	0
Then followed various small items, up to the 14th July, 1831, amounting in the whole to	115	10	0
Cr.	200	0	0
By cash remitted 19th January, 1831 . . . 20 0 0			
Do. . . . . 1st March 20 0 0			
Do. . . . . 17th May 35 0 0	75	0	0

The defendant Tunnicliffe pleaded his discharge under the insolvent debtors' act. Wigley pleaded the general issue. The cause was tried before Lord Chief Justice Tindal, at the Sittings after the last term. The defence on the part of Wigley was, that, on the 14th January, 1831, the partnership between Tunnicliffe and himself had been dissolved, of which notice had been duly given to the plaintiff; and that the papers had since that date been supplied upon the credit of Tunnicliffe only: and he claimed to set off the remittances (made by Tunnicliffe) on the 19th January, 1st March, and 17th May, amounting to 75*l.*, against the 84*l.* 10*s.*, the amount of the bill delivered on the joint account of Wigley and Tunnicliffe, to the 14th January, 1831. The difference between these two sums had been paid into Court. It was contended, on the part of the defendant, that, as the account was entire, the payments must, upon the authority of *Clayton's* case (*a*), and the other cases of that class, be set against the earlier items, in the absence of any specific appropriation either by the payer or the payee.

His lordship thought that it was impossible for the plaintiff, after the particular delivered by him, to contend that the two accounts were not blended together and made one. The plaintiff was thereupon nonsuited.

(*a*) 1 Meriv. 604

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Mr. Serjeant *Stephen*, on a former day in this term, obtained a rule *nisi* that the nonsuit might be set aside and a new trial had. He submitted that the construction put upon it at the trial was dealing much too strictly with the bill of particulars, which was never understood as intending to put the plaintiff's demand into any legal shape. [Mr. Justice *Alderson*.—The safer course would be, not to give any credit in the particulars; but merely to state what the plaintiff claims in the whole, and then state what he goes for.]

Mr. Serjeant *Merewether* now shewed cause.—The nonsuit was correct. Where sums are paid without any specific appropriation, the law applies them in reduction of the earlier items of the account. That doctrine was first laid down in *Clayton's* case, afterwards adopted in *Bodenham* v. *Purchas* (*a*), and further recognised in *Simson* v. *Ingham* (*b*). In *Bodenham* v. *Purchas*, Mr. Justice Bayley says (*c*): "The principle established by the decisions is this, that, where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but, where the accounts are treated as one entire account by all parties, that rule does not apply." And in *Simson* v. *Ingham*, the same learned Judge says (*d*): "The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied (*e*). If he does not make a spe-

(*a*) 2 Barn. & Ald. 39.

(*b*) 2 Barn. & Cress. 65; S. C. 2 Dow. & Ryl. 249.

(*c*) 2 Barn. & Ald. 45.

(*d*) 2 Barn. & Cress. 72.

(*e*) A person who is indebted to another on two several accounts may, on paying him money, ascribe it to which account he pleases; and his election may either be expressed or may be inferred from the circumstances of

cific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz. that, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt." The principles thus clearly defined in these cases must govern the present; for, here, there was no specific appropriation by either party, and the two accounts were dealt with by the plaintiff himself as one entire account.

Mr. Serjeant *Stephen*, in support of his rule.—The law upon the subject of appropriation of payments certainly is pretty much as has been stated. Where there are two accounts, and a general payment has been made, and there has been no specific appropriation of it by the debtor in discharge of either, it is in the power of the creditor to apply it to which account he pleases. In the present case, the payments made by Tunnicliffe would *primâ facie* go in discharge of the debt due from him. [Lord Chief Justice *Tindal*.—The state of the account upon the 19th January, the day on which the first 20*l.* were paid, shews *quo animo* the payment was made. Tunnicliffe was liable for the whole account: and, on that day, there was not so much as 20*l.* due upon the new account.] In *Thompson* v. *Brown* (*a*), it was held, that, though money paid generally

the transaction: but, if the payer does not pay specifically on one account, the receiver may afterwards appropriate the payment to the discharge of either of the accounts that he pleases; and, if he sue on one account, *semble* that he thereby declares his election, and the defendant cannot, by a subsequent notice of set-off, elect to which account he will ascribe the payment. *Peters* v. *Anderson*, 5 Taunt. 596; S. C. 1 Marsh. 238.

(*a*) 1 Moody & Malkin, 40.

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ought to be applied to the first items in an account, yet, where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money is money of the partners, the creditors may not apply it to the private debt of the individual. Lord Chief Justice Abbott there says: "The general rule certainly is, that, when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that, when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others." So, here, the payments cannot be applied exclusively in discharge of the old account, inasmuch as the effect of such application would be to charge a fund not properly chargeable with that debt.

Lord Chief Justice TINDAL.—It appears to me that this rule ought to be discharged. This is a case in which two distinct accounts are involved; one a joint account due from Wigley and Tunnicliffe to the plaintiff, up to the 14th January, 1831; the other a separate account for goods supplied by the plaintiff to Tunnicliffe alone from the 14th January to the 14th July. Tunnicliffe therefore was liable to the plaintiff to the full extent of both the accounts. This being the state of circumstances, Tunnicliffe, on the 19th of January, makes a payment to the plaintiff of 20*l.*, and, on the 1st March and 14th May, two other similar payments of 20*l.* and 35*l.*; all which payments were made without any specific appropriation on the part of Tunnicliffe to either of the two accounts. The question is, whether, upon the evidence, it appeared that Tunnicliffe, who by law had the first right of appropriat-

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ed the payments to any particular part of the account. I am of opinion that enough appears to shew that he has expressed his intention to apply them generally in reduction of the whole account; for, at the time the first payment of 20*l.* was made, there was a very small sum only due from Tunnicliffe to the plaintiff on the separate account; and there is no distinction as to his intention with regard to the subsequent payments. Upon the evidence, therefore, I say that Tunnicliffe has in point of fact applied the sums remitted by him generally in reduction of the plaintiff's demand upon both the accounts. Then, supposing the conduct of Tunnicliffe not to amount to an indication of intention so to appropriate the payments, has the plaintiff, who in the next place has the right(*a*), signified his intention to set the sums received by him against the latter part of the account exclusively? In the absence of appropriation by the debtor, the creditor must make the appropriation at the time the money comes to his hands. Here, there was no evidence that the plaintiff had ever applied the payments in question in discharge of the separate debt of Tunnicliffe. Indeed, he could not do so as to the first payment of 20*l.*; for, at that time, nothing like that sum was due upon Tunnicliffe's separate account. One cannot help seeing, on looking at the bill of particulars, that the plaintiff, at the time he received the money, assented to its application in reduction of the account generally; though I desire to be understood as not deciding this case upon the construction of the bill of particulars, but upon the general rule of appropriation, which the law directs in the absence

(*a*) See *Campbell* v. *Hodgson*, Gow, 74; *Hall* v. *Wood*, 14 East, 243, n.; *Kirby* v. *The Duke of Marlborough*, 2 Mau. & Selw. 18.

A creditor receiving money without any specific appropriation may be permitted in a Court of law to ascribe his receipt to the discharge of a prior and purely equitable debt, and to sue at law for a subsequent legal demand. *Bosanquet* v. *Wray*, 6 Taunt. 597; S.C. 2 Marsh. 319.

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of any specific appropriation by the parties themselves, according to the rule laid down in *Clayton's* case, in *Bodenham* v. *Purchas*, and in *Simson* v. *Ingham*. The case of *Thompson* v. *Brown* cannot apply, because Tunnicliffe was liable to the plaintiff for the entire debt due upon both accounts.

Mr. Justice PARK.—I am of the same opinion. I cannot distinguish this case from *Bodenham* v. *Purchas* and *Simson* v. *Ingham*.

The rest of the Court concurring—

Rule discharged.

Wednesday, May 1st.

A lien attaching upon the goods in dispute does not prevent the party who holds them from applying to the Court for relief under the interpleader act.

A party fairly applying for relief under the interpleader act is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute.

COTTER *v.* The BANK OF ENGLAND.

CERTAIN bullion had been deposited in the Bank of England by the plaintiff. Two persons, of the names of Harris and Guest, assignees of Matthie and another, bankrupts, claimed it as belonging to the estate of Matthie & Co. The Bank are in the habit of allowing bullion to be deposited with them for security by the importers, the Bank paying the freight and charges upon it, and having a lien upon it for their payment of the money thus advanced: but they make no additional charge to the owners. In the present case, the Bank having received notice of the claim of Harris and Guest, and refusing to deliver the bullion in question to the plaintiff, the present action was commenced against them to recover it. Under these circumstances—

Mr. Serjeant *Wilde*, on the part of the Bank, on a former day in this term, obtained a rule *nisi* for relief under the interpleader act, 1 & 2 Will. 4, c. 58. The Bank dis-

claimed all interest in the subject matter of the suit, and offered to bring the proceeds of the bullion into Court, deducting the amount of their claim upon it for freight and charges, or otherwise to deal with it as the Court should think fit.

Mr. Serjeant *Coleridge*, for the plaintiff, opposed the motion, on the ground that certain proceedings had already been taken both before the Lord Chancellor and the Vice Chancellor with respect to the bullion; and therefore he submitted that this Court could not interfere. It appeared, however, that those proceedings were not in the nature of an interpleader. The learned Serjeant further contended, upon the authority of *Braddick* v. *Smith* (*a*), that the Courts of law could not grant relief under the statute in cases where the intermediate party claimed a lien upon the goods which were the subject of the motion.

Mr. Serjeant *Bompas*, appeared for Harris and Guest, the claimants, and consented to abide the order of the Court.

Mr. Serjeant *Wilde*, in support of his rule.—The proceedings in Chancery are not such as would afford the relief intended to be given by the 1 & 2 Will. 4, c. 58. This case is distinguishable from *Braddick* v. *Smith:* there, the Court refused to interfere, because the claim of lien attached only to one of the parties by whom the goods were claimed; whereas, here, the freight must be paid by whichever party ultimately turns out to be entitled to the bullion.—With respect to the costs—in *Aldridge* v. *Mesner* (*b*) and *Farebrother* v. *Pratter* (*c*) it is laid down as a

(*a*) *Ante*, Vol. 2, p. 131; S. C. 9 Bing. 84.

(*b*) 6 Vesey, 418.

(*c*) 1 Daniell, 64.

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general rule, by the Lord Chancellor, that, in all cases, a party coming to interplead fairly is entitled to his costs. As, therefore, the Bank would clearly have been entitled to their costs on filing a bill of interpleader, they are equally entitled to them when availing themselves of the substituted and less expensive proceeding. The fund should be charged.

Lord Chief Justice TINDAL.—It appears to me that this case is within both the principle and the words of the act. It recites that "whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay:" for remedy thereof, it goes on to enact "that, upon application made by or on the behalf of any defendant sued in any of his majesty's Courts of law at Westminster, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, shewing *that such defendant does not claim any interest in the subject matter of the suit*, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and, upon such rule or order, to hear the allegations, as well of such

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third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, *and to make such* other rules and *orders therein as to costs* and all other matters *as may appear to be just and reasonable.*" Looking at the facts of the present case, I can see no mode in which the defendants could obtain relief against the conflicting claims of the parties, except by a bill of interpleader. I was at first inclined to think that the matter might have been settled by the proceedings that have taken place in equity: but that appears not to be so; the rights of the Bank, as stake-holders between the parties, do not appear to have been brought before the Court of Chancery; a bill of interpleader would have been necessary for that purpose. The case therefore stands clear of that objection. Now, in order to bring themselves within the 1 & 2 Will. 4, c. 58, the intermediate parties must shew *that they have no interest in the subject matter of the suit.* Here, the Bank disclaim all interest in the bullion: they merely claim a lien upon it in respect of the freight and charges they have paid on account of it. They do not, however, seek to charge one party or the other; they charge the bullion. The case therefore seems to me to be distinguishable from *Braddick* v. *Smith.* With respect to costs, I think we must decide as we did the other day, in the case of *Duear* v. *Mackintosh* (*a*), viz. that the Bank shall be paid their costs in the first instance out of the fund, or out of the proceeds of the bullion.

(*a*) *Ante*, p. 174.

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Mr. Justice PARK.—Unless we were to hold a case like the present to be within the act, we should avert all the benefit it was intended to produce.

Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—The real question is, what is the subject matter in dispute between the parties. It is not simply the bullion, but the bullion subject to the lien of the Bank for the freight and charges which they have paid on account of it. In *Braddick* v. *Smith* the lien attached upon one party only.

Rule absolute, the form to be settled by a Judge at chambers.

Wednesday, Jan. 31*st.*

ASHTON *v.* NAULL.

Where there have been mutual dealings between a plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3.

THE plaintiff and defendant had had dealings with each other, in the course of which the latter was indebted to the former in the sum of 105*l.* 17*s.* 6*d.*: the sum due to the defendant from the plaintiff was unascertained, the defendant not having furnished his account; but a part of it consisted of a sum of 39*l.* 9*s.* 11*d.*, the price of certain bricks and tiles supplied by the defendant to the plaintiff. The plaintiff arrested the defendant for the whole amount of the debit side of the account, without giving him credit for the goods that had so been furnished to him by the defendant. The cause was referred; and the plaintiff ultimately recovered, by the certificate of an arbitrator, 17*l.* 1*s.* 11½*d.* only.

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Mr. Serjeant *Wilde*, upon an affidavit of these facts, on a former day in this term, obtained a rule *nisi* that the defendant's costs might be taxed and allowed to him under the statute 43 Geo. 3, c. 46, s. 3.

Mr. Serjeant *Coleridge* now shewed cause, upon an affidavit admitting that the plaintiff had arrested the defendant for one side of the account, but stating, that, when the defendant was applied to for the particulars of his claim upon the plaintiff, he refused to give it; whereupon he was told by the plaintiff that he would arrest him for the whole amount of his account; to which he answered—"Very well; do so."—In *Germain* v. *Burrows* (*a*), the plaintiff had employed the defendant, a carpenter, to do work for him under an agreement to pay him in goods. The work done by the defendant amounted to 25*l.*, and the plaintiff had supplied goods to the defendant to the value of 30*l.* and upwards. The defendant having been pressed to state his demand, and having neglected to do so, the plaintiff arrested him for the 30*l.*, and at the trial obtained a verdict for the balance only. On a motion for costs under the statute, the Court adverted to the defendant's neglect to deliver an account of his demand, and held that the work done by the defendant might be used as set-off; therefore the original debt might truly be sworn to as 30*l.*; and said there was no pretence for the motion. [Mr. Justice *Alderson*.—Although the defendant in this case had neglected to deliver his account, the defendant at all events knew of the claim of 39*l.* 9*s.* 11*d.* for the bricks and tiles.] In all the older cases upon this subject, the liability of the plaintiff to an action for a malicious arrest, and his liability to costs under this statute, were held to be correlative. *Donlan* v. *Brett* (*b*)

(*a*) 5 Taunt. 259.

(*b*) 10 Barn. & Cress. 117—where it was held, that, in order to entitle a defendant to his costs under the statute 43 Geo. 3, c. 46, s. 3, on the ground that the plain-

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and *Day* v. *Picton* (*a*) are the last cases that have laid down the rule differently: in the former, Mr. Justice Bayley said: "The question in this case is, not whether an action for a malicious arrest is maintainable, but whether the plaintiff had any reasonable or probable cause for procuring the defendant to be arrested and held to special bail for 575*l.*:" and, in the latter, the same learned Judge said: "Any lawyer to whom the plaintiff might have mentioned the circumstance, must have known that the sum for which he arrested the plaintiff did not constitute a debt till the credit had expired. There cannot, therefore, be said to have existed any reasonable or probable cause for procuring the defendant to be arrested and held to special bail in the amount to which the plaintiff has sworn." The only authority cited in *Doulan* v. *Brett*, was the case of *Silversides* v. *Bowley* (*b*). There, the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to a reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 15*l.* Upon an application to the Court to allow the defendant his costs pursuant to the 43 Geo. 3, c. 46, it was held, that, in order to entitle the defendant to such costs, he must shew that the arrest was vexatious and malicious. The rule adopted in that case has been acted upon in this Court without an exception, down to the case of *Turner* v *Prince* (*c*). There, the

tiff had arrested him for a larger sum than he afterwards recovered, it is sufficient to shew that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for that sum; *it is not necessary to shew malice.*

(*a*) 10 Barn. & Cress. 120. The plaintiff had sold goods to the defendant, to be paid for, half in ready money, and half by bill at three months. The defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods: —Held, that he had no reasonable or probable cause for so doing, and that the defendant was entitled to his costs under the statute.

(*b*) 1 J. B. Moore, 92.

(*c*) 2 Moore & Payne, 305; S. C. 5 Bing. 191.

defendant was arrested for 108*l.* He paid into Court 10*l.*, and at the trial a verdict was taken for the plaintiffs, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred. It appearing before the arbitrator that there was a disputed and complicated account between the plaintiffs and defendant, the one claiming for extra work done to a house, and the other insisting on an allowance for deviations from the mode of finishing it, according to the terms of an agreement, the arbitrator directed the defendant to pay the plaintiffs 29*l.* beyond the 10*l.* paid into Court, together with the costs of the award. The Court refused to allow the defendant his costs under the statute, as he could not, under the circumstances, sue the plaintiffs for maliciously holding him to bail. Lord Chief Justice Best there said (*a*): "I do not say that the Court will in no instance, where a defendant has been arrested for 100*l.*, and the plaintiff recovers only 40*l.*, allow the former his costs, on an application made to them under the statute 43 Geo. 3. But it must be an extremely strong case. Here, however, the transactions between the parties appear to me to have been of too complicated a nature for us now to interfere; nor can we, under the circumstances, say that the defendant could maintain an action against the plaintiffs for having *maliciously* arrested him and held him to bail; and if that action could not have been successfully sustained, there is no ground for this application." [Mr. Justice *Alderson*.—It is not intended that *actual malice* must be proved; but that it must be shewn that the arrest is without reasonable or probable cause. Malice may thence be inferred.] In the present instance, the cause was withdrawn from the jury, and submitted to the decision of an arbitrator, before whom the evidence might take a totally different shape. There are many authorities

(*a*) 2 Moore & Payne, 310.

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to shew that, under such circumstances, the Court will not interfere. In *Payne* v. *Acton* (*a*), Lord Chief Justice Dallas said: "The Court have always attended to the circumstance of the parties going before an arbitrator." And in *Keene* v. *Deeble* (*b*), where a defendant was arrested and held to special bail for 28*l.*, and paid 2*l.* into Court, and afterwards the cause, before it came on for trial, and all matters in difference, were referred to an arbitrator, who had power to examine the parties, and call for books, &c., and it was agreed that the costs should abide the event; the arbitrator having awarded to the plaintiff the sum of 1*l.* 19*s.*, a motion was made to allow the defendant his costs—it was held that this was not a case within the statute, and that the defendant was not entitled to costs. Lord Chief Justice Abbott there said: "Upon an attentive perusal of the act in question, I am of opinion that this case does not come within its meaning. It is manifest that the legislature contemplated a recovery by verdict, whereupon judgment should afterwards be entered. The cause was stopped in its progress by an agreement to refer all matters in difference, and it was made a part of the rule that the costs should abide the event of the award. I am of opinion that money awarded on such a reference is not money *recovered* within the meaning of the act." [Lord Chief Justice *Tindal*.—In the two last cited cases, the Court could not see what was passing in the arbitrator's mind; and in one of them the reference is expressly stated te have been of all matters in difference. Here, however, the plaintiff acted with full knowledge of all the circumstances.]

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

(*a*) 1 Brod. & Bing. 278; S. C. 3 J. B. Moore, 605.

(*b*) 3 Barn. & Cress. 491; S. C. 5 Dow. & Ryl. 383.

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Lord Chief Justice TINDAL.—The only question in this case is, whether, within the words of the statute 43 Geo. 3, c. 46, s. 3, it is made to appear to the satisfaction of the Court, upon hearing the parties by affidavit, that the plaintiff had not *any reasonable or probable cause* for causing the defendant to be arrested and held to special bail in the amount for which he has arrested him. I am not satisfied that the plaintiff had any reasonable or probable cause for arresting the defendant for 105*l.* 17*s.* 6*d.*, the entire amount of the debit side of the account between them. It appears from the affidavits, that, at the time of the arrest, there was a sum of 39*l.* 9*s.* 11*d.*, for which the plaintiff must have been well aware that he was indebted to the defendant. Upon the authority of the decided cases, therefore, as well as upon the good sense and reason of the thing, it is clear that an arrest under these circumstances must be an arrest without reasonable or probable cause. In *Dronefield* v. *Archer* (*a*), it was held, that, where, in an account between the plaintiff and the defendant, there are items clearly due on both sides, it is an arrest without reasonable or probable cause, within the statute, if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account: he ought only to hold the defendant to bail for the admitted balance. And the Court there said: "The effect of the statute of set-off is, to make the balance really due the debt for which the arrest ought to be made. The statute 43 Geo. 3, c. 46, s. 3, directs, that, if a plaintiff holds the defendant to bail in any amount without reasonable or probable cause for so holding him to bail, he shall pay costs. Now, what is a reasonable and probable cause for the arrest? Is it not the obtaining security for that which is fairly due? Now, that

(*a*) 5 Barn. & Ald. 513.

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must be the balance. It is said that a defendant is not bound to set off the debt due to him. That is a very good reason why the plaintiff should be allowed to include in his declaration the whole sum due to him, but it was no ground for contending that a party should thus be deprived of his liberty." It seems to me that that case decides the present; and therefore that the rule should be made absolute.

Mr. Justice PARK.—I am of the same opinion. The case of *Garmain* v. *Burrows* will be found to be not quite so applicable as it seems at first sight to be: the goods there were supplied by way of barter. There is therefore a manifest distinction between that case and *Dronefield* v. *Archer*. I agree with the decision in *Donlan* v. *Brett*. The want of reasonable or probable cause is a circumstance whence malice may be inferred. In the present case, there was a sum of 39*l.* 9*s.* 11*d.* at the least, out of the 105*l.* 17*s.* 6*d.*, for which the plaintiff had no right whatever to hold the defendant to bail, inasmuch as he knew that that sum had been paid off.

Mr. Justice GASELEE.—It is inconsistent to suppose that the plaintiff could have had reasonable or probable cause for holding the defendant to bail to the full amount of the account between them, without deducting the items on the credit side.

Mr. Justice ALDERSON.—Where there is an uncertain demand to set off against an ascertained one, I think it will be found that a party cannot arrest for more than he can conscientiously swear is due to him for the balance. When the question arises, I shall be prepared to pronounce an opinion upon it.

Rule absolute.

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Thursday, May, 2nd.

SYLVESTER *v.* ANTHONY.

Where a copy of a warrant of attorney has been filed under the authority of the statute 3 Geo. 4, c. 39, such copy is good evidence of the contents of the warrant of attorney—at least against the party filing it, and all claiming under him.

THIS was an action brought by the plaintiff to recover from the defendant the balance due upon a warrant of attorney given to the plaintiff by one William Pearson, the due payment of which was guaranteed by the defendant. The cause was tried before Lord Chief Justice Tindal at the Sittings at Guildhall after the last term. The defence was, that, on failure of payment by Pearson of the sum secured by the warrant of attorney, the plaintiff had taken from him a second warrant of attorney at a longer period, and thereby discharged the surety. Notice having been given to the plaintiff to produce the second warrant of attorney at the trial, the defendant offered in evidence a copy, which was proved by a clerk from the warrant of attorney office to have been filed by Messrs. Sylvester & Walker, on the 20th September, 1831, with an affidavit annexed thereto, in pursuance of the statute 3 Geo. 4, c. 39, s. 1. There was no evidence to shew that the original was in the possession of the plaintiff. But it was proved that judgment had entered up on it. On the part of the plaintiff it was contended that the copy was not admissible evidence of the contents of the warrant of attorney, it not appearing that any search had been made at the office for the original. His lordship, however, allowed the copy to be read, on the ground that the statute authorizes the filing of a copy; but he reserved the point. A verdict having been found for the defendant—

Mr. Serjeant *Coleridge*, on a former day in this term, obtained a rule *nisi* for a new trial, on the ground that this piece of evidence had been improperly received (*a*).

(*a*) Another objection taken was, that Pearson, the principal debtor (who had been a bankrupt, and was then uncertificated), was

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[Lord Chief Justice *Tindal*.—The copy of the second warrant of attorney was filed by the plaintiff himself: that fact gives rise to a subordinate question, whether, though not generally admissible, it may not be so as against him.]

Mr. Serjeant *Talfourd* now shewed cause.—The warrant of attorney in question must, under the circumstances, be presumed to have been in the hands of the plaintiff: and therefore, on his failure to produce it upon notice, the copy filed by him under the authority of the statute was, as against him, good secondary evidence.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge*, in support of the rule.—The statute gives a discretion to file a copy for certain purposes: but, by the rule of Court of Michaelmas Term 43 Geo. 3, the warrant of attorney itself must be filed before judgment can be entered up on it (*a*). The statute 3 Geo. 4, c. 39, is directory only, not

received as a witness. It was contended, on the part of the plaintiff, that he was incompetent, inasmuch as his interest preponderated on the side of the defendant by the amount of the costs of this action, to which, it was submitted, he would, on the authority of *Jones* v. *Brooke*, 4 Taunt. 464, be liable in the event of a verdict for the plaintiff.

Lord Chief Justice *Tindal* asked whether any case could be found where it had been held that a surety might throw upon his principal the burthen of the costs of an action against himself. His lordship observed, that, although this was the rule with regard to the acceptor of an accommodation bill, he was not aware of any *general* rule to the same effect.

Mr. Serjeant *Coleridge* conceded that there was no case wherein the precise point had been determined: but he submitted that the principal debtor was bound, under all circumstances, to bear the surety harmless.

This point was, however, subsequently abandoned.

(*a*) By this rule it is ordered that "no judgment shall be signed upon any warrant authorizing any attorney to confess judgment, without such warrant being delivered to and filed by the clerk of the dockets; who is to file the same in the order in which they are received." And see the 3 Geo. 4, c. 39, s. 5.

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compulsory on the party to file the warrant or a copy: it deprives him of certain benefits if he omits to do so.

Lord Chief Justice TINDAL.—It appears to me, that, if a party thinks proper to avail himself of the power given by the statute, of filing a copy of a warrant of attorney, from the moment such copy is so filed, it is conclusive evidence against him of the document of which it purports to be a copy. That the statute so considers it there can be no doubt. The first section provides, "that, if the holder shall think fit, every warrant of attorney to confess judgment in any personal action, *or a true copy thereof*, and of the attestation thereof, and the defeazance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench at Westminster, or *a true copy thereof* in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the said Court of King's Bench." I am therefore of opinion that, when filed, the copy, as against the party himself, and all claiming under him, has all the force and validity of an original; and therefore that the evidence in this case was properly admitted.

Mr. Justice PARK.—I am of the same opinion: and I think great injustice would follow from holding the contrary.

Mr. Justice GASELEE.—The statute makes the copy of the same force as an original document.

Mr. Justice ALDERSON concurred.

Rule discharged.

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Thursday, May, 2nd.

Where a writ of *summons* which had originally been issued into one county was afterwards (without being re-sealed) altered by the substitution of another—The Court set aside the proceedings, on payment of the debt *without costs*, although the defendant had, before taking the objection, obtained a Judge's order for staying the proceedings on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of Court.

SIGGERS *v.* SANSOM.

A WRIT of *summons* was issued against the defendant, on the 10th March, directed to the defendant in the county of Middlesex. It being afterwards discovered that the defendant resided in Surrey, the plaintiff's attorney altered the writ by inserting Surrey in lieu of Middlesex. The writ was not re-sealed after this alteration. The defendant was served on the 15th March. On the 11th April following, he took out a summons to stay proceedings on payment of debt and costs. An order was made thereon, which was afterwards made a rule of Court.

Mr. Serjeant *Bompas*, on a former day, obtained a rule *nisi* to set aside the writ and subsequent proceedings, on the ground that the writ was avoided by the unauthorized substitution of one county for the other.

Mr. Serjeant *Wilde* now shewed cause.—He contended that the application was too late, the defendant having waived the irregularity in the process by his application to stay the proceedings, and, on the order for that purpose being made, undertaking to pay the costs.

Mr. Serjeant *Bompas*.—The writ was not merely irregular, but void, and therefore no subsequent act of the defendant could set it up. In an anonymous case (*a*), the Court set aside proceedings for irregularity, where no *latitat* was issued, notwithstanding three terms' delay in moving the Court. [Lord Chief Justice *Tindal*.—In that case there was no *act* done by the defendant: it was a mere delay to take advantage of the irregularity.] In *Taylor* v. *Phillips* (*b*), it was held that the service of process on a

(*a*) 2 Chit. Rep. 237. (*b*) 3 East, 155.

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Sunday, being absolutely void by the statute 29 Car. 2, c. 7, s. 6, cannot be made good by any subsequent waiver of the defendant, by his not objecting till after a rule to plead given. And Lord Ellenborough said "that it was a matter of public policy that no proceedings in the nature described in the statute should be had on a Sunday; and therefore the regularity or irregularity of them could not depend on the assent of the party afterwards to waive an objection to such proceedings which were in themselves actually avoided by the statute."

PER CURIAM.—The ground upon which we incline to think the proceedings in this case should be set aside, is, that the attorney for the plaintiff has been guilty of gross misconduct in altering the process of the Court without causing it to be re-sealed. We think the rule should be made absolute for setting aside the proceedings on payment of the debt without costs. No hardship or injustice will be inflicted upon the plaintiff by this course; for, under the circumstances, he will not be liable to his attorney for these costs.

Rule absolute.

PATERSON *v.* POWELL.

Thursday, May, 2nd.

A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the Court on the ground that the contract upon which the plaintiff sued was illegal and void.

THIS was an action of assumpsit on a policy. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Guildhall after Michaelmas Term, 1831, when a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit. In the following term a rule *nisi* for a nonsuit or a new trial was obtained, which was made absolute in Michaelmas Term last,

After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this Court—The Court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit.

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on the ground that the instrument upon which the action was founded was a policy of insurance within the statute 14 Geo. 3, c. 48, and void—the assured not being interested in the subject-matter insured (*a*). The defendant having afterwards given notice of trial by proviso, the plaintiff, in the last Hilary Term, obtained a rule to set aside this notice, on the ground that C. H., the attorney on the record, in whose name the notice had been given, had ceased to be an attorney of this Court (*b*).

Mr. Serjeant *Wilde*, on the part of the plaintiff, on a former day in this term, obtained a rule *nisi* for leave to discontinue the action, *without costs*, upon an affidavit stating that the plaintiff's acting attorney was not an officer of this Court, and had therefore conducted the proceedings in the name of C. H., formerly an attorney of this Court, under a written general authority given to him several years ago; and that, since the year 1830, C. H. had ceased to take out a certificate as a London attorney. The learned Serjeant submitted, that, inasmuch as the proceedings had been conducted by an unauthorized person, they were irregular; and that, as the defendant would not, under the circumstances, be liable to his attorney for the costs, he was not entitled to receive costs from the plaintiff. He cited *Hopwood* v. *Adams* (*c*), *Hawkins* v. *Edwards* (*d*), *Pribble* v. *Baghurst* (*e*), and *Vincent* v. *Holt* (*f*).

Mr. Serjeant *Taddy* and Mr. Serjeant *Jones* now shewed cause, upon an affidavit of the defendant, stating, that, on the 1st December, 1832, he had paid 70*l.* to his attor-

(*a*) *Vide ante*, Vol. 2, p. 399; S. C. 9 Bing. 320.

(*b*) *Ante* Vol. 2, p. 773; S. C. 9 Bing. 620.

(*c*) Burr. 2660.

(*d*) 4 J. B. Moore, 603.

(*e*) 2 Sim. & Stu. 246.

(*f*) 4 Taunt. 452.

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ney on account of the costs in the cause; and that, in January last, he for the first time learned that that gentleman was not admitted an attorney of this Court: the defendant's attorney also deposed that he had been in the habit of practising in this Court in the name of C. H.; and that, during the last three years, C. H. had not taken out a London certificate, he having removed to Bath where he practised under the proper country certificate.—The application is made too late. The general rule is, that a plaintiff cannot discontinue after verdict: and the reason assigned in the old books is, that, otherwise, the party might thus have as many new trials as he pleased—*Price* v. *Parker* (*a*). Another objection arises from the consolidation rule made in this and another cause wherein the present plaintiff sued another defendant on the same policy. This motion would affect the last-mentioned action, inasmuch as the consolidation rule would be thereby evaded. But the main question is, whether an attorney who innocently practises in this Court in the name of one who himself had no right to practice here, is precluded from enforcing his claim against his client for costs; for, if the client is responsible to his attorney, or has made advances on account of the expenses of the suit, according to the authority of *Reader* v. *Bloom* (*b*), the client is entitled to recover such costs from the opposite party, notwithstanding an irregularity in the conduct of the attorney. There, a plaintiff who had obtained a verdict against a defendant was held to be entitled to his full costs, even although the person who conducted his cause was not an attorney. Lord Chief Justice Best there said (*c*): "A plaintiff is not to be deprived of his costs because his attorney has not regularly taken out his certificate to qualify him to act as such; he

(*a*) 1 Salk. 178; and see *Roe* d. *Gray* v. *Gray*, 2 Sir W. Blac. 815.

(*b*) 10 J. B. Moore, 261; S. C. 3 Bing. 9.

(*c*) 10 J. B. Moore, 262.

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must be taken to be ignorant as to the qualification of the person he employs as his attorney, and is not bound to inquire into or satisfy himself as to that fact. The legislature, in passing the statutes to which we have been referred (*a*), never intended to interfere with the rights of suitors; they have expressly guarded against it, and directed the punishment to be inflicted on the party offending. It is quite clear that a person practising as an attorney when he is not so, cannot sue for or recover his costs; but the plaintiff is not therefore to be damnified; for, it frequently happens that a client makes advances to his attorney at the outset, or in the progress of the cause; and, *if that were the case here, which probably it is,* and we were to say that the plaintiff is not entitled to his costs against the defendant, the former would never be able to get back such advances." Assuming that the defendant's attorney in this case is not in a situation to sue for his costs, is that a ground for allowing the plaintiff to discontinue except upon the usual terms? [Lord Chief Justice *Tindal.*—If, under the circumstances, the defendant is not liable to his attorney, how can he be damnified by this rule?] In *Welch* v. *Pribble* (*b*), it was held to be no ground for cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate. And Mr. Justice Bayley said: "An attorney who acts as such without having duly qualified himself by taking out his certificate, renders himself liable to a penalty; but the interests of the client are not to suffer for the misconduct of his attorney. A party is not bound to inquire and ascertain whether his attorney is properly qualified before he employs him. I think the point has already been so decided; but I am quite sure that such a decision is consistent with strict justice." In *Young* v. *Dowlman* (*c*), the plaintiff had discontinued, and,

(*a*) 2 Geo. 2, c. 23; 22 Geo. 2, c. 46; and 37 Geo. 3, c. 90.

(*b*) 1 Dow. & Ryl. 215.

(*c*) 3 Younge and Jervis, 24.

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on the taxation of costs, it was objected, on the part of the plaintiff, that the person acting as attorney for the defendant was not an attorney of the Court. No advances of money having been made by the defendant, the master, under the circumstances, refused to allow the costs. On a motion for the master to review his taxation, *Reader* v. *Bloom*, an anonymous case (*a*), and *Welch* v. *Pribble* were cited. Mr. Baron Garrow said: "I should be sorry, if, upon the present occasion, we were called upon to adopt a rule different from that which has been acted upon by the Courts of King's Bench and Common Pleas; but, in discharging this rule, we shall not infringe upon the decisions to which allusion has been made, because the case is in its circumstances altogether distinguishable from those which have been cited. There can be no doubt, that, as between the plaintiff and the defendant, the latter is entitled to receive from the plaintiff all the costs which he may have incurred; and, if it had happened that this person, before he undertook the business, had required an advance of money, the Court would not have interfered to prevent the taxation of costs to that extent, because they would have been unwilling to disturb the rights of his client." Mr. Baron Hullock said: "This is not a case in which the plaintiff is to lose or be deprived of his costs: if he had made any advances of money, he had an opportunity of saying so." And Mr. Baron Vaughan said: "I confess that my mind has in some measure fluctuated during the discussion of this case, in consequence of the decision in the Court of Common Pleas to which allusion has been made (*b*). Upon examination, however, it will be found that the Chief Justice, in his judgment, proceeds upon an assumption that the plaintiff had at the outset made advances to the party who conducted his cause, which circumstance distinguishes that case from the present, for here no advances have been

(*a*) 2 Chit. Rep. 98. (*b*) *Reader* v. *Bloom*, 10 J. B. Moore, 261.

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made; and the question resolves itself into this simple point, whether this Court will lend itself to put money into the pocket of an individual, who, not being an attorney of the Courts of King's Bench and Common Pleas, or legally entitled to practise as a solicitor in the Court of Chancery, has against his own client no remedy." That decision proceeded entirely on the grounds that the party assuming to act as an attorney had no authority to act at all, and that no advances had been made by the client on account of the suit. Here, however, the defendant's attorney is not chargeable with any such misconduct, and it is sworn that a sum of 70*l.* has been advanced by the client. He is, therefore, at all events, entitled to recover costs to that extent.

Mr. Serjeant *Wilde*, in support of his rule.—The policy of the law in requiring that the party in whose name proceedings are carried on shall be an attorney of the Court wherein such proceedings may be had, was, that there should be some person amenable to the jurisdiction of the Court. It was never intended that an attorney of one Court should be able to procure a general licence to practise in the name of an attorney of another Court; but the consent in writing required by the statute (*a*) should be procured in each particular case. With respect to the case of *Reader* v. *Bloom*, the rule there laid down is one which the Court would hardly be disposed to extend.

PER CURIAM.—The defendant is at all events entitled to be re-paid the 70*l.* he has advanced.

The rule ultimately pronounced was as follows:—Both causes—*Paterson* v. *Powell* and *Paterson* v. *Johnson*—to be discontinued; the plaintiff undertaking to bring no fur-

(*a*) 2 Geo. 2, c. 23, s. 10.

ther action, and paying in the first cause the 70*l* advanced by the defendant to his attorney: the second cause to be discontinued without costs, there appearing to have been no money advanced by the client.

Rule absolute accordingly.

HODGES *v.* Lord LITCHFIELD.

Thursday, May 2nd.

Money cannot be paid into Court in an action where the amount sought to be recovered is not a sum certain or capable of being ascertained by computation: nor can money be paid into Court upon *part of a count.*

THIS was an action of assumpsit brought by the plaintiff to recover from the defendant damages for the breach of a special contract for the sale of an estate. The first count of the declaration stated, that, before the making of the promise and undertaking thereinafter next mentioned, to wit, on &c., in &c., by certain articles of agreement then and there made and entered into between R. H. Wyatt, as agent for and on the behalf of the defendant, his heirs, &c., of the one part, and the plaintiff of the other part, the said R. H. Wyatt agreed to sell and the plaintiff agreed to purchase the free and exclusive fishery of the defendant in the river Trent, with the right and privilege of landing nets upon and angling from the lands of the land-owners adjoining the river, and the several farms, lands, and hereditaments described in the schedule to the said articles of agreement, for the sum of 21,500*l.*; of which the sum of 1500*l.* was then paid, and the sum of 20,000*l.*, the remainder thereof, was to be paid on the 21st March then next. [After setting out the agreement, and averring notice thereof to the defendant, the count proceeded as follows]: And thereupon afterwards, to wit, on &c., in &c., in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the de-

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fendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil all things in the said articles of agreement contained on his part and behalf to be performed and fulfilled, he the defendant then and there consented to and approved of the said articles of agreement, and then and there undertook and faithfully promised the plaintiff that he the defendant would make or procure to be made a good title to the said estate by the said articles agreed to be sold, free of tithes, on or before &c., and would perform and fulfil all things in the said articles contained on his part and behalf to be performed and fulfilled. And the plaintiff in fact said, that, although an abstract of the title to the said estate by the said articles agreed to be sold was afterwards and before the said &c., to wit, on &c., delivered to the plaintiff, and one R. H. W. I., a conveyancing counsel employed by and on behalf of the plaintiff, did thereupon object to the defendant's title, and require certain acts, matters, and things to be done, provided, and executed for the completion thereof; and although notice in writing of the particular objections and matters so required was afterwards and before the said &c., to wit, on &c., given to the said T. K. in the said articles of agreement in that behalf mentioned, and the plaintiff was afterwards, to wit, on &c., and afterwards, ready and willing and often offered to pay the said sum of 20,000*l.*, the remainder of the purchase money, &c. &c., and to complete the said purchase, on having a good title to the said estate by the said articles agreed to be sold, free of tithes; and hath always, from the time of making the said articles of agreement hitherto well and truly performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent, and meaning thereof, to wit, in &c.; yet the defendant, not regarding the said articles of agreement, nor his said promise and undertaking so made as aforesaid,

did not nor would, on or before the said &c., or at any time afterwards, make or procure to be made a good title to the said estate by the said articles agreed to be sold, free of tithes, but wholly refused and neglected so to do: By reason of which said several premises the plaintiff had not only lost and been deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase by the plaintiff, but had been put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, in and about the negotiating and agreeing for the purchase of the said estate by the said articles agreed to be sold, and having the same surveyed; and in and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said articles mentioned; and in and about the defence of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the Court of Chancery, for compelling a specific performance by the plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same Court; and in and about the making and performing of divers journies, and otherwise respecting the said purchase: and also thereby the defendant lost and was deprived of a great part of the gains and profits which he might and would otherwise have made and acquired from using and employing the said sum of 1500*l.* so paid by him as aforesaid, and other monies provided and kept by the plaintiff for the completion of the said purchase; and suffered and sustained divers losses to a large amount to wit, to the amount of 200*l.* on the resale of certain sheep, bricks, and hurdles purchased by the plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same, with a view to the completion of the said purchase, to wit, in &c.

The defendant pleaded the general issue.

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The plaintiff's particular of demand, delivered under a Judge's order, was as follows:—

	£.	s.	d.
"To interest at 1*l. per cent.*, on 1500*l.* deposit, from 7th November, 1828, to 23rd. June, 1832, when the deposit was returned.	54	3	3
"To monies paid by the plaintiff in and about the negotiating and agreeing for the purchase of the estate to be sold by the defendant to the plaintiff, and having the same surveyed; and in and about the investigating of the title to the said estates, and the existence of a supposed *modus* in lieu of tithes, to which the same was stated to be subject, and the making and performing of divers journies, and otherwise respecting the said purchase.	262	1	3
"To the amount of the extra costs paid by the plaintiff in and about his defence of a certain suit commenced and prosecuted against him by the defendant in the Court of Chancery, for compelling a specific performance by the plaintiff of certain articles of agreement bearing date the 7th November, 1828, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same Court.	227	9	3
"To the amount of the losses suffered and sustained by the plaintiff in the re-sale of certain sheep, bricks, and hurdles purchased by the plaintiff for stocking and improving the farms, lands, and premises mentioned in the said articles of agreement, with a view to the completion of the said purchase.	100	0	0

Mr. Serjeant *Talfourd*, on a former day in this term, obtained a rule *nisi* that the defendant might be at liberty to withdraw his plea, and to pay into Court the sum of 185*l.* on the first count of the declaration, except to so much of the damage therein alleged as related to the charges and expenses of the suit therein mentioned to have been commenced in the Court of Chancery, and as to the losses alleged to have been suffered and sustained by the plaintiff on the re-sale of sheep, bricks, and hurdles therein mentioned.

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Mr. Serjeant *Wilde* now shewed cause.—This is not a case in which a defendant can be allowed to pay money into Court at all; far less can he be permitted to pay in money on *part of a count*—an application which is quite novel. The action is brought to recover damages for the breach of a special contract. If, indeed, the breach consisted in the defendant's not paying a specific sum of money, the Court would permit the defendant to pay in money generally upon the whole declaration, or upon certain entire counts of it. But where, as here, the amount claimed is not a sum certain or susceptible of computation, but must be left to the discretion of a jury, such a course cannot be allowed. The practice in this respect is thus stated by Mr. Tidd (*a*): "Bringing money into Court is allowed in cases where an action is brought upon contract for the recovery of a debt which is either certain or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury." In *Hallett* v. *The East India Company* (*b*), which was an action of covenant upon a charterparty, for freight and demurrage, on a motion by the defendants for leave to bring money into Court upon two only of the breaches assigned in the declaration, Lord Mansfield said: "In motions of this kind, where the defendant applies to pay money into Court, and to have the demand thereupon struck out of the declaration, the law arises upon the fact; and the true and sensible distinction is, that, where the sum demanded is a *sum certain*, or capable of being *ascertained by mere computation*, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into Court, and have so much of the plaintiff's demand

(*a*) Tidd's Practice, 9th edit. p. 619—citing Com. Dig. tit. "Pleader," (C. 10), and 2 Burr. 1120.

(*b*) 2 Burr. 1120.

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upon him struck out of the declaration; and that, if the plaintiff will not accept it, he shall proceed at his peril. In the present case, it being easy to *ascertain by mere computation* the demurrage at so much per day, and the freight at so much per ton (notwithstanding that different sorts of goods are to pay different rates per ton), and to settle the account very exactly, from facts that must be notoriously known in the ship; and nothing else remaining to be settled, nor anything further being left for the judgment and discretion of the jury to be exercised upon; the defendants ought, in the present case, to be at liberty to pay the money into Court upon these two counts." In *Salt* v. *Salt* (*a*), it was held that the defendant cannot pay money into Court in an action for dilapidations. After time taken to consider, Lord Kenyon there said: "We have looked into the cases, and are of opinion that they do not warrant us in determining that money may be paid into Court in this action. The case of *Squire* v. *Archer* (*b*) is a direct decision on the point; and the same case is also reported in Barnardiston (*c*), which, though not a book of much authority in general, agrees with the report of the case in Strange." And Mr. Justice Grose added "that the true grounds on which rules for payment of money into Court are granted, are accurately stated in Tidd's Practice." In *Fail* v. *Pickford* (*d*), in assumpsit against a carrier for a loss sustained upon goods damaged *in transitu*, the defendant was not allowed to pay the invoice price of the goods into Court. Mr. Justice Heath there said: "The Courts have not gone so far as to allow money to be paid in in cases of uncertain damages. Where there is any contract

(*a*) 8 Term Rep. 47.

(*b*) 2 Str. 906. In an action for dilapidations, the Court, refused to let the defendant bring money into Court, and said it was like trespass, where you cannot do it, though you may tender amends.

(*c*) 2 Barnard. 4.

(*d*) 2 Bos. & Pul. 234.

between the parties upon which the Court can rest, it may be done; but in this case there is no such contract. Suppose an action on the case were brought for negligently driving a carriage, in consequence of which the plaintiff's leg was broken, could the defendant pay into Court the amount of the surgeon's bill?" And in *Strong* v. *Simpson* (*a*), in an action for the breach of a contract to deliver goods at a certain price per ton, the Court refused to allow the defendant to pay money into Court—observing "that money could not be paid into Court in such a case as this without violating every rule of practice upon the subject; that the value of the goods was not the criterion of the plaintiff's damage; but that the declaration sought a compensation for the breach of a specific agreement; and that money might as well be paid into Court in an action for a breach of a promise of marriage." Here, all the items stated in the plaintiff's particular of demand disclose a claim for unliquidated damages; none are fairly matter of computation. The intent and the limit of the rule is, to prevent a defendant being put to unnecessary costs where the amount sought to be recovered in the action is reasonably certain.

Mr. Serjeant *Talfourd*, in support of his rule.—In his particular of demand the plaintiff has ascertained the several sums in respect of which he seeks to recover; and therefore the application falls within the rule stated by Mr. Tidd, as the result of the decided cases. [Lord Chief Justice *Tindal*.—Is this a cause of action for which *debt* could be maintained?] In *Hutton* v. *Bolton* (*b*), which was an action of assumpsit against the defendant, the owner of a stage-coach, for losing a trunk belonging to the plaintiff, though the loss in point of value was 50*l*., the defendant moved for leave to pay 20*l*. into Court, upon an affidavit

(*a*) 3 Bos. & Pul. 14.

(*b*) 1 H. Blac. 299, n.

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stating that he had long since published an advertisement that he would not be answerable for any parcels committed to his care above the value of 20*l.*, unless he was paid in proportion to the risk; and that, though the things lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extra for the carriage—Lord Mansfield said: "The governing principle in cases like the present is, that, where the plaintiff makes that kind of demand which is substantially for a specific sum of money, the defendant may move to pay money into Court. In torts indeed it is otherwise; there it is a mere question of damages—a chance; and as in such cases the defendant was orignally in the wrong, he must take the event of that chance." And Mr. Justice Buller said: "Upon principle, I see no difficulty in suffering the money to be paid into Court. This is an action of assumpsit, and the goods are stated to be of a specific value. The declaration does not state any particular damage or inconvenience in consequence of and independent of the loss, and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods. The defendant might have pleaded the fact, and a tender of the 20*l.* If so, this case comes within the general rule." Here, the plaintiff has by his particular reduced his claim to certain specific sums; and the defendant seeks to pay into Court sufficient to cover the demand as to those portions of it which, according to the case of *Walker* v. *Moore* (*a*), the plaintiff can alone be entitled to recover. In that case, A. having contracted with B. for the purchase of a real estate, the vendor, acting *bonâ fide*, delivered an abstract, shewing a good title; and A., before he examined it with the original

(*a*) 10 Barn. & Cress. 416.

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deeds, contracted to re-sell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds, A. discovered that the title was defective, and thereupon the sub-purchasers refused to complete their purchases, and he refused to complete his purchase from B., and brought an action wherein he claimed as damages the expense he had incurred in the investigation of the title, the profit that would have accrued from the resale of the property, the expense attending the resale, and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. It was held that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor.

Lord Chief Justice TINDAL.—To grant this application, would be in fact trying the merits of the action upon affidavit. The defendant admits the breach of contract. Why, therefore, is the Court to help him to pare down the plaintiff's case, and thus compel him to go to trial at an increased risk? The rule must be discharged.

Mr. Justice PARK.—I am of the same opinion. I never before heard of a motion for leave to pay money into Court upon *part* of a count.

Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—The Court clearly cannot allow money to be paid into Court on part of a count the whole of which applies to a demand for unliquidated damages. Though, where a breach was stated in the declaration which it appeared to the Court could not possi-

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bly arise out of the contract, such an application might be entertained.

Rule discharged.

Saturday, May 4th.

The Court allowed judgment to be entered up on an old warrant of attorney, on an affidavit that a letter had been received from the party, the twopenny post date on which was within the term.

ANONYMOUS.

MR. Serjeant *Talfourd* moved for leave to enter up judgment on an old warrant of attorney, upon an affidavit stating that a letter had been received from the party within the term, through the two-penny post, the post-mark on which bore date the 30th April, 1833.

Granted (*a*).

(*a*) In *Constable* and Another v. *Wren*, in Michaelmas Term, 4, Will. 4, Mr. Serjeant *Andrews* obtained a rule to enter up judgment on a warrant of attorney (more than ten years old) upon the usual affidavit. The attesting witness to the execution of the warrant of attorney was dead; and, to prove the execution, an affidavit was made by *one of the plaintiffs*, verifying the handwriting of the witness.

Monday, May 6th.

By the 54th rule of Hilary Term, 2 Will. 4, *service* of a rule to reply or plead any subsequent pleading is necessary.

POUND *v.* LEWIS.

MR. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to set aside for irregularity (with costs) a judgment of nonpros. which had been signed in this cause on the ground that there had been no service of a rule to reply.

Mr. Serjeant *Adams* now shewed cause.—He stated that all that was ever done in this Court was, to leave the rule to reply at the Secondaries' office. [The Secondary also certified this to have been the constant practice.]

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Mr. Serjeant *Wilde*, in support of the rule.—The practice in the Courts of King's Bench and Exchequer formerly was, to serve the rule to reply, which service was deemed a demand of a replication, and no distinct demand was requisite; but, in this Court, no rule to reply was served, a demand of a replication being necessary. The 54th rule of Hilary Term, 2 Will. 4, provides that "Service of a rule to reply or plead any subsequent pleading shall be deemed a sufficient demand of a replication or such other subsequent pleading." Although that rule dispenses with the necessity (in all the Courts) of a demand of a replication, &c., it could not have intended to dispense with the giving of a rule to reply, &c., otherwise there would be no notice whatever to the party.

Lord Chief Justice TINDAL.—The rule in question implies that there must of necessity be a rule to reply; for, it provides that the service of such rule shall be deemed a sufficient demand of a replication. It seems, that, since the promulgation of the new rules, the practice has not been altered in the office; it is, however, clearly irregular. The judgment must, therefore, be set aside; but, under the circumstances, I think it should be without costs.

Rule absolute, without costs.

WAINWRIGHT, Assignee of WHITEHOUSE, an Insolvent Debtor, *v.* MILES.

Monday, May 6th.

THIS was an action of assumpsit tried before Lord Chief Justice Denman, at the last Assizes for the county of War-

A. being in insolvent circumstances, and having sold his goods by public auction (the proceeds remaining in the hands of the auctioneer), the defendant, under pretence of having issued a fiat of bankruptcy against A., prevailed upon the auctioneer to pay over to him the amount of his debt, and subsequently procured the assent of A. to such payment. A., more than three months afterwards, petitioned the insolvent debtors' court for his discharge under the act. In an action by his assignee to recover back the sum so paid:—*Held*, that it ought to have been left to the jury to say whether the transaction did not amount to a voluntary charging of his estate by the insolvent, and whether he did not at the time contemplate taking the benefit of the act.

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wick. The plaintiff, as assignee of the estate and effects of Whitehouse, an insolvent debtor, sought to recover from the defendant a sum of 75*l.*, the money of the insolvent, received by the defendant under the following circumstances:—The insolvent was the occupier of a public-house at Birmingham. In the month of June, 1832, he became considerably embarrassed in his circumstances. His goods were sold by public auction on the 18th June. The proceeds of the sale, after deducting the duty and expenses, amounted to about 102*l.* The defendant on the 17th July gave notice to the auctioneer not to pay over the proceeds to Whitehouse, as a fiat of bankruptcy had been or was about to be sued out against him. Shortly afterwards the defendant and the insolvent met, when the latter consented that the sum in question (75*l.*) should be paid by the auctioneer to the defendant, the defendant permitting the insolvent to receive the balance. The auctioneer had previously paid over the money to the defendant under an indemnity: this payment was made on the 23rd July, and the assent of the insolvent given about a fortnight afterwards. The insolvent was arrested and rendered to prison on the 1st November, and presented a petition for his discharge under the insolvent debtors' act on the 5th. On the part of the plaintiff, his son was called as a witness. He deposed, that, on his applying to the defendant concerning the money, the latter admitted that he had received it; adding that he had "frightened Whitehouse, and done the auctioneer out of 75*l.*" It also appeared that Whitehouse observed, in reference to the transaction, "If Miles will let me have the 25*l.* (meaning the balance), he may keep the 75*l.*, and the other creditors may be damned."

On the part of the defendant, it was submitted that the case was not within the provisions of the 32nd section of the insolvent debtors' act, 7 Geo. 4, c. 57 (*a*), more than

(*a*) Which enacts, "That, if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before

three months having elapsed from the time of Whitehouse's assent to the defendant's retaining the money, up to the time of filing the petition to the insolvent court by the former. On the other hand, it was contended that it was properly a question for the jury whether the whole transaction was not bottomed in fraud, and with an intention on the part of Whitehouse to apply for the benefit of the insolvent debtors' act.

His lordship, however, nonsuited the plaintiff, reserving to him liberty to move the Court for a rule to set aside the nonsuit, and enter a verdict for the plaintiff for the sum claimed, or for a new trial.

Mr. Serjeant *Goulburn*, accordingly, on a former day in this term, obtained a rule *nisi*.

Mr. Serjeant *Adams* now shewed cause.—Whether a payment be voluntary or not, depends upon the fact whether it be made within three months from the date of the insolvent's petition. The question of fraud cannot arise. [Mr. Justice Alderson.—If the payment be made with a view to a fraudulent preference of the particular creditor,

or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under this act."

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though the three months may have elapsed, still it is within the act.] The payment was clearly within the proviso as to the three months: as to whether or not the payment was a fraudulent preference, there was no evidence to go to the jury. The only case in this Court shewing the meaning of the word "voluntary" is that of *Arnell* v. *Bean* (*a*). The Lord Chief Justice there says (*b*): "The word 'voluntarily' in that section (s. 32 of the 7 Geo. 4, c. 57,) must have some proper meaning of its own, distinguishable from that of fraudulent; in the first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would of itself have declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein mentioned, should be deemed and were declared to be fraudulent and void. We think the word 'voluntarily' is used in the statute to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bona fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously and without any pressure on his part to obtain it." Here, the transaction was any thing rather than a voluntary or spontaneous delivery by Whitehouse: the payment was made by the auctioneer, who, according to the evidence, was frightened into it.

Mr. Serjeant *Goulburn* in support of his rule.—The case was prematurely stopped by the learned Judge. It was precisely such a one as the statute was intended to embrace. Two questions arose at the trial—first, whether this was a voluntary payment—secondly, whether, when it was made, Whitehouse contemplated taking the benefit of

(*a*) *Ante*, Vol. 1, p. 151; S. C. 8 Bing. 85. (*b*) *Ante*, Vol. 1, p. 159.

the act. Both these were questions for the jury; and there was abundant evidence of fraud. In the case cited no fraud was suggested.

Lord Chief Justice TINDAL.—Upon the whole, I think it would be more satisfactory to have the facts submitted to another jury. The ground upon which the nonsuit appears to have proceeded was, that there was no evidence of a voluntary preference so as to avoid the payment. Now, it seems to me that there was at all events some evidence of a voluntary *charge*, if not of a voluntary transfer of the money by the insolvent: he assented to the payment being made by the auctioneer to the defendant. There was also evidence for the jury as to the intent of Whitehouse at the time of the payment to petition the insolvent debtors' court. The whole transaction was bottomed in fraud.

Mr. Justice PARK.—There certainly was evidence, and I think very considerable evidence of fraud.

Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—The first question, viz, whether or not the payment amounted to a voluntary transfer, charge, or delivery of the insolvent's property, was clearly a question for the jury. If there was no evidence whence a reasonable jury could draw any conclusion upon the subject, the nonsuit was right; but it seems to me that there was evidence which the plaintiff had a right to have submitted to the jury. Although the transaction did not take place within three months from the date of the petition, still the question arises, whether the payment might not have been made or assented to by Whitehouse with a view to petitioning for his discharge under the insolvent debtors' act.

Rule absolute.

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Tuesday, May 7th.

Appearing to oppose a rule, does not waive an objection to the form of the affidavit upon which the rule was obtained—such as, the omission of the Christian name of one of the parties in the title of the cause.

No taxation of costs is necessary upon a cognovit.

CLOTHIER *v.* ESS.

MR Serjeant *Bompas*, on a former day, obtained a rule *nisi* that the defendant might be discharged out of custody, on the ground of an alleged irregularity in the proceedings against him. The defendant had been taken in execution by virtue of a judgment signed upon a cognovit, without having received any notice of the taxation of costs, as the learned Serjeant contended was required by rule 12, Trinity Term, 1 Will. 4, by which it is ordered, that, "before taxation of costs, one day's notice shall be given to the opposite party.

Mr. Serjeant *Andrews, contrà*, objected that the affidavit upon which the motion was founded omitted to state the Christian name of the defendant in the title of the cause. He submitted that no taxation of costs was necessary in the case of a cognovit, wherein the costs are ascertained and fixed.

Mr. Serjeant *Bompas*, in support of his rule, contended that the objection as to the want of a Christian name was waived by the plaintiff's appearing and using affidavits in opposition to the rule.

Lord Chief Justice TINDAL.—Whatever may be the proper construction of the rule in question, this motion is at all events against the merits and against the intention of that rule. In the case of a cognovit, the taxation of costs would be mere matter of form. Without, however, deciding the point, it is enough to say that I think the rule must be discharged upon the preliminary objection —the absence of the Christian name of the defendant in the title of the cause upon the affidavit. There is no

complete name: perjury could not be assigned upon such an affidavit.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—There is no foundation for the argument urged on the part of the defendant, that the plaintiff should have stood upon the preliminary objection, and not have filed affidavits in answer. I think the plaintiff has acted wisely; for, the Courts have said that they would not allow costs where a rule is discharged upon an ungracious objection: the plaintiff, therefore, very properly appears to shew that he has something like an answer upon the merits. With respect to the construction of the 12th rule of Trinity Term, 1 Will. 4, it is not necessary upon this occasion to determine whether or not it applies to costs on a cognovit; but I incline to think it does not, for, the costs form part of the cognovit, and are insusceptible of taxation (*a*).

(*a*) This point has since been decided by Mr. Justice Patteson, in the King's Bench Practice Court, in conformity with the inclination here expressed by Mr. Justice Gaselee. A cognovit had been given for debt and costs in an action on a bill of exchange. Judgment having been signed for the amount of debt and costs mentioned in the cognovit and the costs of signing judgment, without any notice of taxation having been given pursuant to the above-mentioned rule, a motion was made for setting aside the judgment and execution for irregularity. On discharging the rule Mr. Justice Patteson said it was not necessary to tax the costs of signing judgment on the cognovit, because the amount of such costs is an ascertained sum, which cannot be reduced; that, the amount of the other costs being ascertained in the cognovit, it was not necessary to tax them; and that, no taxation being necessary, no notice of taxation could be so; but that the rule referred to could only apply to those cases in which a notice of taxation is necessary: and the rule was discharged *with costs*. *Griffiths* v. *Liversedge*, MS. 1 May, 1833, K. B.

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CLOTHIER v. ESS.

Mr. Justice ALDERSON concurred on the first point, but gave no opinion upon the construction of the rule.

Rule discharged, with costs.

Wednesday, May 8th.

Where a writ of *scire facias* has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself.

WILLIAMS *v.* BROWN.

THE writ of *capias* in this cause was returnable on the 16th April, and a *scire facias* was lodged in the office on the 30th, returnable on the 4th of May.

Mr. Serjeant *Storks*, on a former day, obtained a rule *nisi* that the writ of *scire facias*, and the proceedings thereon, might be set aside for irregularity, on the ground that the writ had not lain the requisite number of days in the office.

Mr. Serjeant *Wilde, contrà*, submitted that the rule was improperly framed, and did not meet the complaint, inasmuch as it sought to set aside *the writ* (which was unexceptionable) for a supposed irregularity in putting it in force.

PER CURIAM.—The rule ought to have prayed that the proceedings only should be set aside.

Rule discharged.

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COWPER and Another, Executors of NASH, deceased, *v.* GODMOND, Clerk.

Wednesday, May 8th.

ASSUMPSIT for money had and received, to recover the balance of the consideration money for the purchase of an annuity. Pleas—non assumpsit, and non assumpsit infra sex annos. At the trial, before Lord Chief Justice Tindal, at the sittings in London after last Michaelmas Term, a verdict was found for the plaintiffs for the balance claimed, subject to the opinion of the Court upon the following case:—

"By a certain indenture produced by the plaintiffs, bearing date the 31st May, 1824, an annuity of 237*l.* was granted by the defendant for his life to Andrew John Nash and George Augustus Nash. The consideration paid for the same was 1999*l.* The annuity was further secured by a warrant of attorney and judgment thereon for the sum of 4,000*l.*, which were set forth in the grant of the annuity. The indenture was duly executed by the defendant, and the consideration money paid by the grantees. An error was committed in the memorial, by stating the amount of the annuity to be 257*l.* instead of 237*l.* Payments were made on account of the annuity in the year 1829, but not after. Writs of execution and sequestration upon the judgment mentioned in the annuity deed were sued out in 1829, to recover the arrears in that year, and the vicarage of the defendant was sequestered, and his goods and chattels taken in execution. Evidence was offered at the trial, on the part of the plaintiffs, that the writs of execution and sequestration were sued out at the request of the defendant. In Michaelmas Term, 1830, the defendant obtained a rule in the Court of King's Bench for setting aside the warrant of attorney and judgment, and the writs of execution and sequestration, on the ground of the defect in the memorial of the annuity—

The statute of limitations is no bar to an action brought to recover back the consideration paid for an annuity, notwithstanding more than six years have elapsed since the date of the grant, where the grantor (having for some years paid the annuity without objection) has, within six years from the commencement of the action, elected to avoid the annuity by reason of a defective memorial.

Money had and received is the proper form of action in such a case.

Payments made by the grantor on account of the annuity, may be set off against the consideration money paid on the purchase, upon a record properly framed.

Quære, whether the grantee is entitled to interest upon the consideration money—*Semble* not.

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'upon payment of all the costs of the judgment and execution, of the sequestration, and of the application, by the defendant.'

"The plaintiffs were the executors of Andrew John Nash, who survived George Augustus Nash, his co-grantee; and they sought to recover by this action the balance of the consideration money originally paid for the annuity. The annuity deed was put in evidence at the trial uncancelled."

The questions for the opinion of the Court were—"first, whether the statute of limitations was an answer to the action"—secondly, "whether the plaintiffs were entitled to recover, the annuity deed being uncancelled." If the Court should be of opinion that the plaintiffs were entitled to maintain the action, the verdict was to stand for the plaintiffs. If the Court should be of opinion that the action was not maintainable, a nonsuit was to be entered.

Mr. Serjeant *Wilde*, for the plaintiffs.—The first question is, whether the statute begins to run from the date of the grant, or from the time the grantor elected to avoid the annuity. Until this latter period, the plaintiff was not in a situation to commence the action. In *Weddell* v. *Lynam* (*a*), it was expressly held by Lord Kenyon, that, where an annuity has become void for a defect in the memorial, the grantee cannot maintain an action for money had and received to recover back the consideration money, unless the annuity has been set aside by act of the Court, or the grantor has refused to re-execute valid securities, or to pay the annuity. *Waters* v. *Mansell* (*b*) is to the same effect. Sir James Mansfield there said: "Lord Kenyon's opinion is clearly law so far as this, that the plaintiff cannot, by his own negligence, alter the contract from a contract of annuity to a contract of money had and

(*a*) 1 Esp. Rep. 309. (*b*) 3 Taunt. 56.

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received." And in *Davis* v. *Bryan* (*a*), where A. purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant of annuity was inrolled—it was held that A.'s executrix could not on that ground insist that the contract was void, and recover back the consideration money paid for the annuity. "The testator," said Mr. Justice Bayley, "received the whole of that which he bargained for, and now his representative says that the contract was void from the beginning. Is there any thing like good conscience in the claim? Then, is the contract void? The act of parliament says, that, unless a memorial be duly enrolled, the deed of which no memorial is enrolled shall be void; but, in many cases, such words have been held to make the instrument voidable only at the will of the party, and I think we are at liberty to put that construction upon them in the present case." In *Scurfield* v. *Gowland* (*b*), where the grantor of an annuity applied to have it set aside on motion, and to vacate a judgment which had been irregularly entered up on a warrant of attorney, which was given for entering up judgment on a bond in the Court of Common Pleas, to secure the annuity, and which warrant of attorney was improperly described in the memorial; and the Court of King's Bench accordingly set aside the judgment—it was held that the grantee might recover back the consideration money, in assumpsit, and was not put to his action on a bond which was also given for securing the annuity, and which bond was not ordered to be cancelled, though voidable in pleading by virtue of the annuity act. One of the arguments urged on the part of the plaintiff in that case was, that the defendant had made his election to vacate the annuity; and having at least withdrawn from the plaintiff *one* of his securities for it, the consideration which was paid for *all* the securities had failed, and therefore he was entitled to re-

(*a*) 6 Barn. & Cress. 651. (*b*) 6 East, 241.

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cover it back." Lord Ellenborough said: "The argument last urged is very forcible. The plaintiff contracted for one entire assurance consisting of several securities, and he has a right to have that assurance entire, or to have back his money. The defendant has taken away one of his securities, and therefore the consideration for the money has failed. On this ground I think the present action may be sustained." The only case to be found bearing a contrary aspect is that of *Walker* v. *Liscarray* (*a*). There, the action was brought to recover a sum of money, being the consideration paid by the plaintiff for an annuity granted to him by the defendant in January, 1801. This annuity had been set aside by the Court in Michaelmas Term, 1805, on account of a defect in the memorial. Prior to the annuity being so set aside, the defendant had become bankrupt, and had then obtained his certificate. Lord Ellenborough said: "The annuity having been set aside must be considered as if it had never existed; of course the relation took place to the time when the money was paid, which having been paid for an annuity afterwards set aside, there was no consideration for the money paid, and the plaintiff's title to the money was from that time: the plaintiff's right to the money having therefore preceded the bankruptcy, the certificate was a bar." If this doctrine be law, it will lead to this extraordinary consequence, that a grantor of an annuity having a latent defect, by treating it as a valid and subsisting grant for a period of six years, and then coming to the Court to set aside the securities, may deprive the grantee of all power of suing for the recovery of the consideration; for, so long as the annuity was paid, the consideration could not be recovered back. Here, the grantor treated this as a subsisting contract from May, 1824, down to Michaelmas Term, 1830. Until this latter period, there was no moment at

(*c*) 6 Esp. Rep. 98.

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which the grantee had a right of action; and therefore the statute could only then begin to run.—At all events, even supposing the period of limitation to have begun to run from the date of the grant, the payments made since on account of the annuity take the case out of the statute —*Waters* v. *Mansell*—9 Geo. 4, c. 14.

2. The next question is, whether the defendant is entitled to set off against the plaintiffs' claim the sums paid by him from time to time on account of the annuity. Upon this point Sir James Mansfield, in the case of *Burdon* v. *Browning*, says (*a*): "I was utterly astonished when I found that it had been decided at *Nisi Prius* that money which had been paid by the Rev. Mr. Bromley as annuity *eo nomine*, was to be converted into principal and interest, though the grantee ran the risk of the annuity every hour. How the instalments of annuity paid ever came to be considered as part of the price returned, I know not; probably if it were *res integra* it would be held differently. It is most unreasonable to say that this is money paid in part of the principal and interest." [Lord Chief Justice *Tindal*.—Is it not money had and received on both sides." In *Hicks* v. *Hicks* (*b*) Lord Ellenborough says: "This was either an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by the one party to the other's use. If the consideration of the annuity be money had and received, it must be money had and received with all its consequences; and therefore the defendant must be at liberty to set off his payments as such on the same score."] That would not be placing the grantee in his original situation: he has in the interim run the risk of the annuity. [Lord Chief Justice *Tindal*.—The danger is over at the time the question arises.] Lord Eldon, in *Bromley* v. *Holland*, says (*c*): "I was always struck with the difficulty upon this, whether

(*a*) 1 Taunt. 522. (*b*) 3 East, 16. (*c*) 7 Ves. 22.

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it is consistent with the conduct of a moral man to take his chance, paying the annuity as long as he thinks it beneficial, and, when he finds it so no longer, turning round, and saying he has done all a man looking attentively to his own interest can, and that he is acting legally, insisting in a Court of justice that what he has paid so long as an annuity he will not consider so, but as part of the consideration repaid. Upon the maxim '*quod dubitas ne feceris*,' I never could have made such a demand. The grantee is left for a number of years in this situation:—If he dies at the end of the first year, and as long as it is in his favour, the grantor will make no complaint, and will think it just to avail himself of it. When the lapse of time turns the advantage the other way, he then represents that there is no annuity; and, though the payments were made for many years as annuity, he will then treat them as consideration money. I remember when the idea that it could be so considered had not been adopted at law; for, though Lord Rosslyn, in *Byne* v. *Vivian* (*a*), says there are several cases, no such case can be found; and Lord Kenyon's original decisions took the other turn, upon the sound principle that a payment voluntarily made is not to be recovered back. But I must decide this upon the weight of authority as to be applied at this day; and the Courts of law now unquestionably hold that the consideration may be recovered back; and have been in the habit of allowing payments made as annuity to be deducted." That habit was admitted with evident reluctance, and arose under the equitable jurisdiction of the Court; and it was invariably accompanied with the allowance of interest to the grantee. The case last cited arose upon an appeal from a decree of Lord Alvanley in the same cause (*b*), where that learned Judge had held that the grantee was entitled to recover back the consideration paid for the annuity, with *5l. per*

(*a*) 5 Ves. 604. (*b*) 5 Ves. 610.

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cent. interest; and that the payments made on account of the annuity were not to be set off. The proper question to be considered is, whether the payments in question are such as the grantee ought, in equity and conscience, to be allowed to retain: for, if so, the set-off should not be allowed. Judge after judge has expressed surprise as to how the habit of allowing it has arisen; and all have disapproved the rule. In *Beauchamp* v. *Borrett* (*a*), Lord Kenyon held the grantee to be entitled to recover back the *whole* purchase money, with interest. [Lord Chief Justice *Tindal*.—This question does not properly arise here; no set-off is pleaded: and with respect to the interest, that may perhaps be arranged without the Court giving any opinion upon the point.]

Mr. Serjeant *Jones*, *contra*.—After the cases of *Shove* v. *Webb* (*b*), *Scurfield* v. *Gowland*, and *Hicks* v. *Hicks*, it cannot be contended that money had and received will not lie in such a case as the present. With regard to the statute of limitations, the period of limitation clearly commences from the time the cause of action arose, viz. the time the money was received by the defendant. This either was or was not an annuity. The present action supposes that it never was so: it assumes the security from the outset to have been vicious, and therefore to be considered as if it had never existed. The language of Lord Ellenborough in *Walker* v. *Liscarray* is precisely in point, and the doctrine there laid down goes the whole length of the present case. "The annuity" says his lordship, "having been set aside, must be considered as if it had never existed; of course the relation took place to the time when the money was paid, which having been paid for an annuity afterwards set aside, there was no consideration for the money paid, and the plaintiff's title to the money was

(*a*) Peake's N. P. C. 109. (*b*) 1 Term Rep. 732.

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from that time." [Mr. Justice *Alderson*.—In *Murray* v. *The East India Company* (*a*), which was an action by an administrator upon a bill of exchange payable to the testator, but accepted after his death, it was held that the statute of limitations began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there was a party capable of suing. In the present case, so long as the annuity was allowed by the grantor to subsist, there was no cause of action, and no party capable of suing.] The grantee might have put himself in a situation to sue at any time he pleased: he might have demanded fresh securities. Besides, it is the duty of the grantee to see that the securities are effectual; and it is his own fault if they are not so. In *Hewell* v. *Young* (*b*), the declaration stated that the plaintiff had contracted with A. B. to lend him the sum of 3000*l.* at interest; the repayment, with interest, to be secured by a warrant of attorney and certain mortgages of freehold and leasehold premises, provided they should be found to be a sufficient security for the same; that the plaintiff retained the defendant as an attorney to ascertain whether they would be a sufficient security; that the defendant accepted such retainer; and that it became his duty to use due care and diligence to ascertain whether the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.*, with interest. Breach, that the defendant did not use due care and diligence in that behalf, but wholly neglected so to do, and, on the contrary, falsely represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security for the repayment of the 3000*l.*, with interest; whereupon the plaintiff lent the 3000*l.* to A. B.; and that they were not a sufficient security: by reason whereof the plaintiff had wholly lost the

(*a*) 5 Barn. & Ald. 204. (*b*) 5 Barn. & Cress. 259.

interest due and payable on the said sum of 3000*l.*, amounting to a large sum, to wit, the sum of 1000*l.*, and was likely wholly to lose the said principal sum of 3000*l.* At the trial it appeared, that, in the year 1814, the defendant had been retained by the plaintiff to ascertain whether the warrant of attorney and mortgages were a sufficient security for the 3000*l.* and interest, and that at that time he represented they were so. In the year 1820 (the interest to that time having been regularly paid), it was discovered that the warrant of attorney and mortgages were not sufficient security. It was held that the misconduct or negligence of the attorney constituted the cause of action, and that the statute of limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient. The very language of the plea—non assumpsit infra sex annos—necessarily has relation back to the time when the original transaction took place.

The statute 9 Geo. 4, c. 14, cannot in any way apply. The payments here made were not payments made on account of the claim now set up by the plaintiff, but on account of a supposed annuity, and therefore they cannot enure to take the case out of the statute of limitations.

Lord Chief Justice TINDAL.—The only question which the Court is called on to decide in this case is, whether the statute of limitations operates as a bar to an action for money had and received brought to recover back the consideration money paid for the purchase of a void annuity, granted more than six years before the commencement of the action, until which period it had been treated by the grantor as a subsisting annuity. I am clearly of opinion, upon a consideration of the decided cases, that money had and received will lie, and that the statute of limitations is no bar to the plaintiff's right to recover. The action is

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brought to recover back money paid, on a subsequent failure of the consideration. The cause of action arises upon the step taken by the grantor to avoid the annuity: it may be said to embrace two periods—the one, the grant of the annuity—the other, the grantor's availing himself of the objection to the annuity, and electing to set it aside: the right of action to recover back the consideration dates from the latter proceeding. It would be unjust to hold the cause of action to be complete from the date of the original transaction; for, then this consequence would follow, viz. that the grantor of an annuity which is liable to be set aside by reason of some defect, might go on paying the annuity for six years, and then, taking advantage of the defective state of the securities, move to set them aside at a time when the statute would preclude the grantee from recovering back the consideration money. A conclusion so manifestly absurd and unjust evidently shews that such a case is not within the intention of the statute. The case of *Waters* v. *Mansell* appears to me to go the whole length of the present case. There, the statute of limitations was pleaded, but the point was abandoned. I think there should be judgment for the plaintiff.

Mr. Justice PARK.—I am of the same opinion. How could the plaintiffs sue to recover back the consideration money so long as the annuity was a subsisting annuity? The case of *Weddell* v. *Lynam*, which goes the whole length of this, was quoted with approbation by Sir James Mansfield in *Waters* v. *Mansell*. I do not agree with the doctrine of Lord Ellenborough in *Walker* v. *Liscarray*.

Mr. Justice GASELEE.—Some stress was laid in the argument on the part of the defendant, on the form of the plea, which is, non assumpsit infra sex annos; but it does not strike me that that makes any substantial difference. How the plea of non assumpsit infra sex annos ever arose, I am

at a loss to understand: the words are not warranted by the statute.—What is the object of the present action? To recover money had and received by the defendant to the use of the plaintiffs. When did it accrue? Could the action have been maintained at any time before the grantor declared that he would take advantage of the error in the memorial? The cases cited on the part of the plaintiffs shew that the grantee could not take advantage of his own act, and could not treat the annuity otherwise than as a good and subsisting annuity, so long as the grantor chose to pay it; and consequently, that the plaintiffs' cause of action did not accrue until the setting aside of the securities.

Mr. Justice ALDERSON.—I always entertain considerable doubt whenever any question arises involving the doctrine of relation. It is contended, on the part of the defendant, that, when the annuity was set aside, the consideration money became money had and received by the grantor to the use of the grantees from the moment that it was paid: and certainly the doctrine attributed to Lord Ellenborough in *Walker* v. *Liscarray*, if it could be supported, would go to that extent. But it seems to me that the sensible construction is this—that the consideration was money had and received by the grantor at the time of the grant of the annuity, but not to the use of the grantees until the former elected to avoid the securities.

Judgment for the plaintiffs.

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Wednesday, May 8th.

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Before the union of parishes effected by the statute 22 Car. 2, c. 11, there was a custom in the parish of St. M. P. for the parishioners to join with the rector in the election of a parish clerk. By that act the parish of St. M. C. was united to that of St. M. P., the church of the latter parish remaining:—*Held*, that the right of election after the union continued in the inhabitants jointly with the rector, and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was a void appointment; and consequently that a person so appointed could not maintain trespass against the churchwardens, &c., for forcibly expelling him from the reading-desk of the parish clerk.

Quære, whether the election should be made by the rector and the inhabitants of both parishes in joint vestry assembled, or by the rector with the inhabitants of St. M. P. alone; and whether the rector should be present at the time of the election, to make the appointment valid?

TRESPASS. The first count of the declaration stated that the defendants, on the 15th January, 1832, assaulted the plaintiff, and laid hold of him, and struck him, and pulled him by his arms and legs, and endeavoured to force him out of a certain reading-desk in which he then was, and tore his clothes, &c. The second count charged a common assault.

Pleas—1. The general issue.—2. That, before and at the time when &c. in the first count of the declaration mentioned, the defendant Cooke was one of the churchwardens of the parish of St. Mary Colechurch, in London, united with the parish of St. Mildred, Poultry, in London, duly elected and appointed; and that the plaintiff, on the day mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk in the declaration mentioned, such reading-desk then and there being in and part of the parish church of the said parishes so united, and being the place assigned and duly set apart for the parish clerk of the said parishes for the performance by him of his duties as such clerk in assisting in the celebration of divine service in the said church; and the said plaintiff thereby then and there hindered and prevented a certain person, to wit, one T. S. Bullard, who then and there was the parish clerk of and for the said parishes duly appointed and entitled to act in that behalf, from taking possession of the said reading-desk, as he was entitled and about to do in order to assist and for the purpose of assisting in the celebration of divine service, and which service was about to commence, and was accordingly celebrated in the said church; and thereby also the plaintiff unlawfully and improperly hin-

dered, delayed, and prevented the due, proper, orderly, and devout celebration of divine service in the said church, to the great scandal of divers devout parishioners, &c.; whereupon the defendant Cooke, so being such churchwarden as aforesaid, gently admonished the plaintiff of the impropriety of such his behaviour, and requested him to leave the said reading-desk, that the said T. S. Bullard might, as such clerk, take possession thereof, and that divine service might not be interrupted or delayed, and might then and there immediately commence; but the plaintiff refused so to do, and wrongfully remained in possession of the said reading-desk: whereupon the said defendant Cooke, so being such churchwarden, and the other defendant, at his request, and in his aid and assistance and by his command, gently laid their hands upon the plaintiff, in order to remove him from the said reading-desk, and prevent his further delaying the due celebration of divine service, &c.—*3.* That, on &c., being Sunday, divine service was performed in the said church of the said united parishes, and that, just before the said time when &c., such service was about to commence and be celebrated in the said church, to wit, at &c., and divers inhabitants of the said united parishes and other devout persons were then and there assembled together in the said church for the purpose of assisting in the performance and celebration of such last-mentioned divine service, and attending the same; and the plaintiff then was in the said church, and was then and there illegally, irreverently, and improperly making a noise and disturbance therein, to the scandal of such last-mentioned inhabitants and other devout persons so being then and there assembled, and then and there made and continued such noise and disturbance therein, whereby the performance of such divine service was likely to be interrupted and delayed: whereupon the defendant Cooke, so being such churchwarden as aforesaid, then and there admonished the plaintiff of the impropriety and in-

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decency of such his behaviour, and requested him to cease making such noise and disturbance, which the plaintiff then and there wholly neglected and refused to do; whereupon the defendants molliter manus imposuerunt, &c.—4. That T. S. Bullard was the parish clerk of and for the said united parishes; and that the plaintiff, assuming and pretending to have been duly appointed parish clerk of the said united parishes, intruded himself into the reading-desk, and then and there wrongfully and improperly pretended to act and declared that he would act as parish clerk during the performance of divine service then and there being about to commence as last aforesaid, the plaintiff not being such parish clerk or entitled to act as such, and thereby then and there hindered and prevented the said T. S. Bullard, so being parish clerk of the said united parishes, from entering and taking possession of the said reading-desk, for the purpose of officiating as such parish clerk, and assisting in the celebration of divine service then being about to commence as last aforesaid, as he was entitled to do, and obstructed him in the exercise of his duties as such clerk; whereupon the said T. S. Bullard then and there requested the plaintiff to come out from and leave the said reading-desk, in order that the said T. S. Bullard might as such clerk take possession thereof for the purpose of assisting in the performance of such divine service so then and there about to commence as last aforesaid, but the plaintiff then and there neglected and refused so to do, and wrongfully remained in possession of the said reading-desk: and thereupon the defendants, at the request of Bullard, molliter manus imposuerunt, &c.—5. "And for a further plea as to the assaulting the said plaintiff, and the seizing and laying hold of the said plaintiff, and with their fists giving and striking the said plaintiff the said blows and strokes first mentioned, and the pulling the said plaintiff by his arms and legs, and endea-

vouring to force him from out of the said reading-desk, and the shaking and pulling about him the said plaintiff, and casting and throwing him the said plaintiff down to and upon the ground, and giving him the said blows and strokes secondly mentioned, and the rending, tearing, and damaging the said clothes and wearing apparel in the said first count mentioned, and therein supposed to be done— the said defendants, by leave, &c., say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say, that, before and at the said time when &c. in the said first count mentioned, he the said defendant W. Cooke was one of the churchwardens of a certain church, to wit, the parish church of the united parishes of St. Mildred, Poultry, and St. Mary, Colechurch, in London, duly appointed in that behalf; and that the said plaintiff, just before and at the said time when &c. in the said first count mentioned, to wit, on the day in that count mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk in the said first count mentioned, such reading-desk then and there being in and part of the said parish church of the said united parishes, and being the place assigned and duly set apart for the parish clerk of the said parishes for the performance by him of his duties as such clerk in assisting in the celebration of divine service in the said church, and which service, before and at the said time when &c. in the said first count mentioned was about presently to commence, and was accordingly celebrated in the said church: and by the said conduct of the said plaintiff the performance of such service in due and regular manner, with the assistance of the parish clerk of the said united parishes, was then and there likely to be obstructed and delayed, to the great scandal of divers devout parishioners then and there assembled for the purpose of such service: whereupon the said defendant

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W. Cooke, so being such churchwarden as aforesaid, then and there gently admonished the said plaintiff of the impropriety and indecency of such his behaviour, and requested him to come out of and from and to leave the said reading-desk, in order that the performance of such service in such due and regular manner as aforesaid might not be obstructed or delayed; but the said plaintiff then and there neglected and refused so to do, and wrongfully remained in possession of the said reading-desk; whereupon the said defendant W. Cooke, so being such churchwarden as aforesaid, and the defendant W. P., in aid of the said W. Cooke, and by his command, at the same time when &c. in the said first count mentioned, gently laid hands upon the said plaintiff, for the purpose of removing him from the said reading-desk, and preventing him obstructing or delaying the performance of the said divine service in such due and regular manner as aforesaid; and because the said plaintiff thereupon violently resisted such their endeavour, and continued by force in possession of the said reading-desk as aforesaid, the said defendant W. Cooke, being such churchwarden as aforesaid, and the said W. P., in aid of the said W. Cooke, and by his command, at the said time when &c. in the said first count mentioned, did necessarily and unavoidably commit the residue of the said trespasses in the introductory part of this plea mentioned, as they lawfully might for the cause in that behalf aforesaid, doing no unnecessary damage or violence to the said plaintiff or his apparel, and making no unnecessary disturbance on that occasion; which are the same trespasses in the introductory part of this plea mentioned: and this &c., wherefore &c."—6. Justifying in like manner the trespasses charged in the second count of the declaration.

Issue was joined upon the plea of the general issue, and a replication de injuriâ to the others.

The cause was tried before Lord Chief Justice Tindal,

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at the Sittings in London after last Michaelmas Term. The action was brought to try the right of the plaintiff to the office of parish clerk of the parishes of St. Mildred's, Poultry, and St. Mary, Colechurch, which were originally distinct parishes, but were united by the statute 22 Car. 2, c. 11 (a). The 63rd section of that statute enacts "That the several parishes hereinafter mentioned shall be respectively united into one parish, in manner hereafter following, that is to say, the parishes of St. Mildred's, Poultry, and St. Mary, Colechurch (amongst a number of others), shall be united into one parish, and the church heretofore belonging to the parish of St. Mildred's, Poultry, shall be the parish church of the said parishes so united." The 65th section provides, That the plate and goods belonging to the churchwardens of the parishes of those churches to be rebuilded whereunto the other churches burnt down are united by this act, shall be enjoyed by the parishes of those churches to be rebuilded, whereunto the churches burnt down are united by this act, to the use of the said churches and parishes respectively:" and section 68, "That, notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and remain distinct, and as heretofore they were before the making of the present act,"

The office of parish clerk of the united parishes in question became vacant in the year 1831, by the death of one Terry. The plaintiff had officiated for Terry for some years previously to the death of the latter.

On the 13th of April, a joint vestry meeting was held, for the purpose of electing a parish clerk. The plaintiff

(a) The act passed to regulate (amongst other things) the rebuilding of the churches destroyed by the great fire of London, in 1666.

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and Bullard being respectively proposed, the shew of hands appeared to be in favour of the latter. The result of this meeting was reported to the rector, who however refused to confirm the choice of the vestry, but appointed the plaintiff. The appointment was in the following form:—

"I, Richard Crawley, rector of the united parishes of St. Mildred's, Poultry, with St. Mary, Cole, in the city and diocese of London, do hereby nominate and appoint Mr. John Hartley to the clerkship of the said united parishes, now vacant by the death of Mr. J. Terry. Witness my hand this 16th day of April, 1831."

This appointment was deposited by the plaintiff in the office of the Bishop of London, and he subscribed the articles and took the oaths in the usual form; but he never obtained a license, Bullard having entered a caveat against a license being granted. After the meeting of another joint vestry, and much correspondence between the rector and certain of the parishioners, who claimed a concurrent right with him in the election of a parish clerk, and the bishop of the diocese having interfered, the rector, yielding to the wishes of the vestry, wrote to the curate recalling the appointment of the plaintiff; and, on the 9th of October succeeding, the vestry clerk received the following letter from the rector:—

"Dear Sir,—I wrote to Mr. South (the curate) a few days ago, begging him (as I did not know Mr. Hartley's direction) that he would inform him that I should withdraw his nomination to the clerkship of the united parishes. I have now to beg you will have the goodness to insert in the vestry book that I have appointed Mr. Bullard to that situation, with the consent and approbation of the parishioners in vestry assembled."

The plaintiff however continued to perform the duty of parish clerk: and, on the 11th January, 1832, he received from the vestry clerk the following letter, inclosing the rector's letter of the 9th October, 1831:—

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"Sir,—I am directed by the churchwardens of St. Mildred's, Poultry, and St. Mary, Colechurch, to acquaint you, that, in pursuance of an order of vestry made on the 17th day of November last—'That the vestry clerk be directed to take the necessary measures to carry into effect the appointment of T. S. Bullard as parish clerk of these united parishes on the 13th day of April last, and to which the rector has given his concurrence by his letter of the 9th October'—it is the intention of the churchwardens with myself to be at St. Mildred's church on Sunday morning next, the 15th inst., to carry into effect such order of vestry: on which occasion Mr. Bullard will attend, and take upon him the duties of the office."

The plaintiff refusing to relinquish his appointment, the assault complained of was committed by the defendants, in endeavouring to remove him by force from the reading-desk, shortly before the commencement of the service.

In order to shew that the right to elect a parish clerk was jointly in the rector and parishioners, several entries in old vestry books were offered on the part of the defendants, but rejected on the ground that it did not appear that the rector was present at the meetings to which they referred. Extracts from the registry of the diocese of London were produced on both sides; amongst others, one of an appointment of a person to the office of water-bearer in the parish church of St. Mary, Colechurch, bearing date in the year 1629, which commenced thus:

"Whereas the rector of the parish of St. Mary, Colechurch, *and the parishioners there*, have rightly and duly chosen Thomas Letten to fill the office of water-bearer, &c."

This document purported to have been signed by the rector. The next, which also applied to the parish of St. Mary, Colechurch, was dated in 1664—the appointment of one William Wilson to be assistant to Thomas Leeson, by the choice of the rector and parishioners. Similar entries

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were produced relating to the parish of St. Mildred's, Poultry. The first was a license dated 1661, and signed by Dr. Perrinchiefe, the then rector of that parish, to the following effect:—

"These are to certify that John Leeson was chosen parish clerk of St. Mildred, in the Poultry, by the general consent of the parish."

There was a further license dated 1663, similarly attested; and in the year 1670 (the year in which the two parishes were united), was one as follows:—

"We whose names are hereunto subscribed do recommend the appointment of William Wilson, the person who has been assisting the late parish clerk, to be the parish clerk, to be his successor."

This appointment was also signed by the rector and parishioners. Others were put in of later date, some of which were by the rector alone, others by the inhabitants in vestry assembled, jointly with the rector. The following entry appeared in the vestry book of the united parishes, dated February 16th, 1787, and signed by the rector:—

"For the prevention of disputes in time to come, it is resolved that the right of choice, nomination, and appointment to the office of parish clerk for these united parishes is in the rector for the time being, with the consent and assent of the churchwardens, parishioners, and inhabitants of the same respectively."

On the part of the plaintiff, it was contended, that, by the general rule of law, the right of election of a parish clerk was vested in the rector alone; and that there was no evidence in the present case of a custom to establish a joint right in the rector and inhabitants.

The Lord Chief Justice told the jury, that, if the custom for the rector and parishioners to elect jointly was established, the plaintiff's appointment by the rector alone was invalid: and he directed them, if they thought such

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custom was proved, to find a verdict for the defendants; otherwise, for the plaintiff, with nominal damages. The jury returned a verdict for the defendants.

Mr. Serjeant *Jones*, in the last Hilary Term, obtained a rule *nisi* that this verdict should be set aside and a new trial had, on the grounds—first, that there could be no immemorial custom to authorize an appointment of one parish clerk for the two united parishes—secondly, that, even if there could be such a custom, the vestry for each parish should vote separately—thirdly, that the appointment of Bullard was invalid, inasmuch as it purported to be an appointment by the vestry alone, and not by the vestry in conjunction with the rector; and that both the concurring parties should be together doing the act—fourthly, that the office of parish clerk being an incorporeal hereditament, the right to it could not properly be tried in this form of action.

Mr. Serjeant *Adams* and Mr. Serjeant *Stephen* shewed cause in the course of the same term.—Unless the plaintiff's appointment be valid, the election and appointment of Bullard to the office of parish clerk of the united parishes is unquestionable: he was appointed by the concurrent acts of the rector and the inhabitants; and it is not necessary that the rector and inhabitants should be assembled together at the time. This is admitted to have been the custom anterior to the union of the parishes; and there is nothing in the statute 22 Car. 2, c. 11, to extinguish that custom. In *Reynoldson* v. *Blake* (*a*), it was held, that, notwithstanding an union, the moduses of each parish continue, and each parish, as to taxes, duties, rates, repairs of the church, &c., continues distinct. Mr. Justice Powell there (speaking of an union of parishes at com-

(*a*) 1 Lord Raym. 196.

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mon law) says: "If there is after the union but one church and one benefice (as is proved before), then there could be but one advowson, and that is of the church to which the union is made." The principle laid down in that case is recognized in *Wilson* v. *Van Mildert* (*a*), where it was held, that, where three parishes have been united by the statute 22 Car. 2, c. 11, the benefice may be described in pleading as one rectory. The tendency of the authorities is to shew that the act of 22 Car. 2, c. 11, effects a complete union of the parishes thereby intended to be united. The enlargement of a parish cannot destroy its identity or take away any custom pre-existing therein.

Mr. Serjeant *Jones*, *contrà*, (Mr. Serjeant *Wilde* was with him).—The only question raised on the record is that which was left to the jury, viz. whether or not Bullard was duly appointed. The propriety of the appointment of the plaintiff need not, for the purposes of this action, be inquired into. The right in the inhabitants to elect jointly with the rector, must arise from an immemorial custom. By the common law, the right of appointing a parish clerk was clearly in the rector alone. There is no provision in the act for the appointment of one clerk for the two parishes; and therefore any custom which might before have existed was at an end, and the right vested in the rector, as at common law. [Mr. Justice *Bosanquet*.—Who, immediately after the union of the parishes, would by the operation of the act have been the parish clerk? Mr. Justice *Alderson*.—The clerk of the parish to the church of which the annexation was made.] Suppose the antient customary mode of appointment to have differed in the two parishes—in the one by the rector alone, in the other by the rector jointly with the inhabitants—could it be contended that the common law mode of election would not attach? [Lord Chief Justice *Tindal*.—The jury have

(*a*) 2 Bos. & Pull. 394.

found that the appointment of Bullard was conformable to the custom that had obtained down to the time of the union of the two parishes. I told them that my impression was that the subsequently existing custom would follow the course of the old one.] At all events, supposing the right to be in the rector and the inhabitants jointly, the appointment by both must be concurrent acts. The judgment of Sir John Nicholl, in the case of *Wenmouth* v. *Collins* (*a*), seems to favour the right of the rector. In *The King* v. *Williams* (*b*), it was held that it is necessary that a presiding officer who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed; and that the election cannot be proceeded in during his absence, although he should improperly absent himself. Mr. Justice Dampier there said: "The question is whether this election took place at a meeting at which the mayor presided. In *The King* v. *Buller* (*c*), it was considered as necessary for the mayor to be present during the whole of the election until it was completed; and that for the want of his presence the election was void; the reason of which is, that, where the presence of any party is required at an election, he must be personally present at the time when the election is declared." [Lord Chief Justice *Tindal*.—How does it appear here that it was the custom for the rector to be present at the time of election?] In order to do a joint act, the presence of all the parties at the same time and place is requisite. In *The King* v. *Bower* (*d*), where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being (they being for that purpose congregated and assembled together), or the

(*a*) In a note to *Wilson* v. *M'Math*, 3 Barn. & Ald. 244.

(*b*) 2 Man. & Selw. 141.

(*c*) 8 East, 389.

(*d*) 1 Barn. & Cress. 491.

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greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor:" it was held that a majority of each definite body must be present in order to make a valid election. These authorities are conclusive to shew that the absence of the rector at the time of Bullard's appointment rendered it invalid.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action of assault and battery, in which the defendants justified, in one of the special pleas, that the defendant Cooke was one of the churchwardens of the parish church of St. Mary Colechurch, London, united with the parish of St. Mildred's Poultry, in London, and that the plaintiff, on the day on which &c., being Sunday, wrongfully and improperly intruded himself into and took possession of the parish clerk's reading-desk in the parish church of the said parishes so united, and thereby prevented one T. S. Bullard, who was the parish clerk duly appointed, from taking possession of the said reading-desk; whereby the plaintiff unlawfully hindered and prevented the devout celebration of the divine service: and because the plaintiff refused to give it up, the defendant Cooke, as churchwarden, and the other defendant Payne, in his aid, gently laid their hands on the plaintiff to remove him from the reading-desk, &c. In another special plea the defendants justified in a similar manner upon the ground that the plaintiff had wrongfully and improperly intruded himself into and taken possession of the reading-desk of the parish clerk; without alleging that Bullard had been duly appointed to that office. To these pleas, and to others very similar in substance, the plaintiff replied the general traverse, *de injuriâ &c.*, upon which issues were joined. The cause was tried before me at the Sittings for London after

last Michaelmas Term, when the jury found a verdict for the defendants; to set aside which verdict, and for a new trial, a motion was afterwards made, upon the ground that, although a custom may have existed in each of the parishes of St. Mildred's Poultry and St. Mary Colechurch separately, namely, that the parish clerk of each of those parishes should be chosen by the rector and the major part of the parishioners in each parish; yet, by the union of the two parishes, under the statute 22 Car. 2, c. 11, such custom in each is altogether destroyed, and the common law right of appointment by the rector must prevail in its stead; and consequently that Bullard could have no legal right to the office of parish clerk of the united parishes, inasmuch as the validity of his election rested upon a custom which had already ceased to exist; but that the plaintiff, who was nominated and appointed by the rector of the united parishes to fill the office, before Bullard was elected, must be held to have had the right to the office of parish clerk. For the purpose, however, of determining the question immediately before the Court, viz. whether this action is maintainable, it seems to us sufficient to determine the latter point only—whether Hartley was duly appointed to the office of parish clerk; for, whatever may be the objection to Bullard's election to the office, yet, unless Hartley was the real parish clerk, he has no right of action: if Hartley was a stranger who had intruded himself into the reading-desk of the parish clerk immediately before the celebration of divine service, whereby the decent and proper celebration of such service would be prevented, we feel no doubt whatever but that the churchwarden of the parish, upon his refusal to give up possession of the desk, might justify removing him from it without violence. The case of *Hawe* v. *Planner*(*a*) appears to us a sufficient authority to this point.

(*a*) 1 Wms. Saund. 13.

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There can be no doubt, after the evidence given at the trial, that, before the union of the two parishes in 1760, there was a custom in the parish of St. Mildred's Poultry, and a similar custom in the parish of St. Mary Colechurch, that the parish clerk of each parish should be chosen by the rector and the major part of the parishioners: and the only question as to the validity of Hartley's appointment becomes this, whether, by the union of the two parishes by the statute 22 Car. 2, c. 11, s. 63, this custom in each parish was put an end to, and the common law mode of nomination by the rector interposed in its stead. The union of churches (not of parishes) was a proceeding by no means unusual at common law. It is laid down in many authorities, and particularly in Brooke's Abridgment (*a*), that, where two churches are of little value, and unable to support their charges, they might be united and consolidated by the assent of the ordinary, the patrons, and the incumbents, with the leave of the Crown: or, where the church was vacant at the time of the union (which was more frequently the case), then, by the assent of the patrons and the ordinary, and the license of the Crown. Such an union, however, consolidated the churches, not the parishes; it neither extinguished the tithes, nor a modus for them (*b*); but, as to taxes, duties, rates, reparations of the church, &c., the parishes continued distinct as before (*c*). In giving judgment in *Reynoldson* v. *Blake* (*d*), Mr. Justice Powell says, "If there is after the union but one church and one benefice (as is proved before), there can be but one advowson; and that is of the church *to which* the union is made;" and this, he says, "agrees with the common law, from which the doctrine of unions was borrowed (*d*). By union, the

(*a*) Titles "Appropriation," "Union," and "Consolidation." And since the statute 22 Car. 2, c. 11, both parishes shall be contributory to the repair of the church made the parish church. Skin. 616.

(*b*) 1 Salk. 165.

(*c*) Hobart, 67.

(*d*) 1 Lord Raym. 196.

(*e*) Lindewood's Provinc. 159.

church which is united becomes extinct; and, of the two benefices, the more worthy shall be retained." So that, if this had been an union of the two churches at common law, independent of the provisions contained in the statute of Car. 2, then would the church of St. Mildred's Poultry, *to which* the union has been made, have been considered as the church or benefice which was retained, the church of St. Mary Colechurch being extinct: but the parishes of St. Mildred's Poultry and of St. Mary Colechurch would have continued parishes as before, having one parish church, one incumbent, one parish clerk; but having all the rights which were before vested in the parishioners of each parish, and which were capable of being still exercised, preserved in full force—separate tithes, separate moduses, separate poor rates, separate proportions of church rate, separate officers: and, under these circumstances, it seems difficult, on any legal principle, to lay it down that the union of the two churches had *deprived* the parishioners of either parish of the right of electing the parish clerk which they before possessed; or, at all events, that the union of the two churches should *deprive the parishioners of St. Mildred's Poultry* of the right which they before possessed of electing, together with the rector, the parish clerk who was to officiate in the same identical church and the identical reading-desk in which he performed the duty before the union. Unless, however, the parish of St. Mildred's Poultry were so deprived, and the common law right vested in the rector, the appointment of Hartley by the rector would have been bad, if this had been an union at common law.

The question, however, does not rest upon the nature and effect of an union at common law, but upon the construction of the statute 22 Car. 2, c. 11, under which such union was made. The 63rd section of that statute, after enacting, "that the fifty-one parishes within the city hereinafter mentioned shall remain and continue as hereto-

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fore they were," proceeds to enact " that the several *parishes* hereafter mentioned shall be respectively united into one *parish* in manner hereafter following, that is to say [amongst others], the parishes of St. Mildred's Poultry and St. Mary Colechurch shall be united into one parish; and the church heretofore belonging to the parish of St. Mildred's Poultry shall be the parish church of the said parishes so united." By the 71st section, the site of the church of St. Mary Colechurch, and the materials thereof remaining on the said site, are given and settled on the Company of Mercers, for the purpose of building a free school thereon. And that the church *which remained* was considered as that *to which* the union was made, appears clearly from the 65th section, which directs that the plate and goods belonging to the churchwardens of the parishes whose churches are burnt down, and not to be rebuilded, shall be enjoyed by the churchwardens of the parishes of those churches to be rebuilded, " *whereunto the other churches burnt down are united* by this act, to the use of the said churches and parishes respectively." The union, therefore, created by the act was not simply an union of *churches*, as that which was known to the common law, but, in the very terms of the act, an union of *parishes*: and, if the legislature had rested there, it might have created a difficulty as to the continuance of a custom which existed before the union in each separate parish; but it appears to us that any difficulty of that nature is prevented by the 68th section of the act, by which it is enacted, " that, notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and remain distinct and as heretofore they were before the making of the present act."

As, therefore, before the union of the two parishes,

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there was in the parish of St. Mildred's Poultry a right belonging to the parishioners to join with the rector of the parish in the election of a parish clerk of such parish, and as, by the act, the church of St. Mildred's Poultry is the church which remains, and consequently that *to which* the union is made, this parochial right is preserved, and must still continue, unless it is one of those particularly mentioned and specified in the act. There is, however, no mention or specification of this right, and consequently no reason why it should have been abolished by the union. Indeed, the union contemplated by the statute is just as perfect, whether the parish clerk performing the duty in the church of St. Mildred's Poultry, to which the church of St. Mary Colechurch has been united, is appointed by the rector alone; or by the rector and the majority of the parishioners in both parishes; or by the rector and the majority of the parishioners in the parish of St. Mildred's Poultry.

We by no means intend to express any opinion that the election by the rector and the majority of the parishioners in *the two parishes*, assembled in their united vestry, is not the more proper mode of election. Such mode appears to have taken place immediately after the union was made, and seems more entirely to preserve the parochial rights of both parishes. But, as it is not necessary for us to decide this point on the present occasion, we hold it sufficient to say that the appointment of Hartley, being made by the rector alone, without the concurrence of the majority of the parishioners of the parish of St. Mildred's Poultry, is a void appointment; and consequently, that, under the circumstances of this case, he cannot support the present action of trespass.

Rule absolute.

1833.

Wednesday, May 8th.

An executor suing in his representative character upon a contract made with his testator, is liable to costs upon a judgment as in case of a nonsuit, where such costs have been occasioned by his *wilful default.*

WOOLLEY, Executor, *v.* SLOPER, Executor.

THIS was an action of covenant brought by an executor to recover damages for a breach occurring since the death of his testator. Five notices of trial had been given by the plaintiff, and no proceedings taken thereon. On the last occasion, the defendant obtained judgment as in case of a nonsuit, and the Prothonotary, on taxation, allowed the defendant the costs of the cause.

Mr. Serjeant *Bompas*, on a former day in this term, obtained a rule *nisi* that the Prothonotary might be directed to review his taxation, on the ground that the plaintiff, as executor, was not liable to pay costs.—In *Booth* v. *Holt* (*a*), the defendant had obtained a rule for judgment as in case of a nonsuit, under the statute 14 Geo. 2, c. 17, the plaintiffs not having proceeded to trial in due time after issue joined: on motion to refer it to the Prothonotary, to tax the defendant his costs, "the Court held clearly that the plaintiffs were not liable to costs, the words of the statute being so strict as to preclude all argument from principle." So, in *Cooke* v. *Lucas* (*b*), where the plaintiffs sued as executors in covenant against the lessor of their testator, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator—it was held that they were not liable to pay the costs of a judgment as in case of a nonsuit, inasmuch as, though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. In Tidd's Practice (*c*), it is said, that "Executors and administrators are not particularly excepted out of the statute 23 Hen. 8, c. 15; yet, as that statute only relates to contracts

(*a*) 2 H. Blac. 277. (*b*) 2 East, 395. (*c*) 9th edit. p. 978.

made with or wrongs done to the plaintiff, it has been uniformly holden that they are not liable to costs, when plaintiffs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as, upon a contract entered into with the testator or intestate, or for a wrong done in his life time." The reason why an executor, suing in his representative character, shall not be liable to costs if he fail, is, because he is supposed not to be cognizant of the contracts made by his testator.

Mr. Serjeant *Wilde* now shewed cause.—In *Booth* v. *Holt*, and *Cooke* v. *Lucas*, there was no suggestion of the plaintiffs having been guilty of any laches, as in the present case. An executor, like the guardian of an infant plaintiff, if he misconduct himself in the course of the suit, is clearly liable to costs—*Shaw* v. *Mansfield* (*a*)—*Nunes* v. *Modigliani* (*b*)—*Hawes* v. *Saunders* (*c*). Where the executor neglects toproceed to trial pursuant to notice, and omits to countermand the notice of trial, he ought not to be protected from the penalty of costs, inasmuch as he thereby occasions unnecessary expense to the defendant.

Mr. Serjeant *Bompas*, in support of his rule, submitted that mere laches on the part of an executor plaintiff was not a ground for compelling him to pay the costs of a judgment as in case of a nonsuit.

Lord Chief Justice TINDAL.—The plaintiff in this case was obliged to sue in his representative character; and therefore, according to the ordinary course of practice, he would not have been liable to costs had he proceeded to trial and been nonsuited. The statute 14 Geo. 2, c. 17, enacts "that, where any issue is or shall be joined

(*a*) 7 Price, 209. (*b*) 1 H. Blac. 217. (*c*) 3 Burr. 1584.

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in any action or suit at law in any of his majesty's Courts of record at Westminster, &c., and the plaintiff or plaintiffs in any such action or suit hath or have neglected or shall neglect to bring such issue on to be tried according to the course and practice of the said Courts respectively, it shall and may be lawful for the judge or judges of the said Courts respectively, at any time after such neglect, upon motion made in open Court (due notice having been given thereof), to give the like judgment for the defendant or defendants in every such action or suit as in cases of a nonsuit; unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue: and if the plaintiff or plaintiffs shall neglect to try such issue within the time so allowed, then and in every such case the said judge or judges shall proceed to give such judgment as aforesaid: provided always that all judgments given by virtue of this act shall be of the like force and effect as judgments upon nonsuit, *and of no other force or effect:* provided also that the defendant or defendants shall, upon such judgment, be awarded his, her, or their costs in any action or suit where he, she, or they *would upon nonsuit be entitled to the same, and in no other action or suit whatsoever.*" The words of the act are strict and precise. But, in the present case, inasmuch as there appears upon the affidavits to have been five notices of trial given, I think there has been such wilful default on the part of the plaintiff as to oust him of the protection to which he would otherwise have been entitled. I therefore think the matter should go back to the Prothonotary, in order that he may ascertain and allow to the defendant such costs only as have been occasioned by the wilful default of the plaintiff.

The rest of the Court concurring—

Rule absolute accordingly.

In The Exchequer Chamber.

EASTER TERM, 3 WILL. IV.

SMYTH *v.* LATHAM.

[*In Error.*]

1833.

Tuesday, April 23rd.

THIS was an action of debt for money alleged to have been received by the defendant to the plaintiff's use. The cause was tried before Lord Chief Justice Tenterden, at the Sittings at Westminster after last Hilary Term. The plaintiff proved his appointment as one of the paymasters of exchequer bills, by a writing bearing date the 21st June, 1811, under the hands and seals of three of the then lords commissioners of the treasury. The deed was as follows:—

"To all to whom these presents shall come, the lords commissioners of his majesty's treasury send greeting: Whereas, by a writing or constitution, bearing date the 22nd April, 1811, under the hands and seals of three of the then lords commissioners of his majesty's treasury, J. P., E. H. N., and H. J., were constituted and appointed to the office of paymaster or paymasters of all and every the sums of money which should from time to time be received and set apart at the receipt of his majesty's Exche-

Under the statute 48 Geo. 3. c. 1, s. 10, the tenure of the office of one of the paymasters of exchequer bills is a tenure during pleasure only, and not during good behaviour or for the life of the grantee.

The subsequent appointment of a new paymaster in the place of a former one is a virtual revocation of the appointment of such former paymaster, even though the instrument under which the new appointment is made contains no express clause of revocation of the old one, and though it allege contrary to the fact that the former paymaster *had resigned*.

The salary received by the substituted officer could in no event become money had and received to the use of his predecessor.

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quer, for paying off, discharging, and cancelling, as well all the exchequer bills already made forth and issued as all other exchequer bills which should or might be made forth and issued at the said receipt, or should or might in like manner be directed by any act or acts of parliament already passed or to be passed to be paid off and discharged and cancelled; and by the said writing or constitution the yearly fee or salary of 400*l.* net was directed to be paid to each of them the said J. P., E. H. N., and H. J.; and the said J. P., E. H. N., and H. J., and every of them, were thereby required to obey such rules, orders, and instructions in respect of their paying and accounting and other matters relating to the execution of the said office which they should from time to time receive from the high treasurer or commissioners of his majesty's treasury for the time being, as in and by the said writing or constitution may more fully and at large appear; and whereas J. P., one of the paymasters so appointed as aforesaid, has resigned his said office: now know ye that we, the lords commissioners of his majesty's treasury, very much confiding in the ability, care, and fidelity of W. C. Smyth, have nominated, constituted, authorized, and appointed, and by these presents nominate, constitute, authorize, and appoint him, the said W. C. Smyth, together with the said E. H. N. and H. J., to be the paymaster or paymasters of all and every the sums of money which shall from time to time be reserved and set apart at the receipt of his majesty's Exchequer for paying off, discharging, and cancelling as well all the exchequer bills already made forth and issued as all other bills which shall or may be made forth and issued at the said receipt, and shall or may in like manner be directed by any act or acts of parliament already passed, or to be passed, to be paid off, discharged, and cancelled by such paymaster or paymasters, and for paying the interest quarterly to become due upon such exchequer bills until they shall be paid off and discharged, and for

paying premium or premiums, rate or rates, which, according to any contract or contracts to be made as mentioned in the said acts for exchanging and circulating the said bills or any of them, shall be due and payable to such contractors; and the said E. H. N., H. J., and W. C. Smyth are hereby directed and required jointly and severally to do, perform, and execute, or cause to be done, performed, and executed, all matters and things whatsoever, as well with respect to the monies to be imprested to them, as to the paying off, cancelling, and discharging of the several bills, or any of them, as are or shall be by the respective acts of parliament in that case required to be done, performed, and executed; and the said W. C. Smyth is hereby required, jointly with the said E. H. N. and H. J., to obey and perform all rules, orders, and instructions relating to the execution of the said office of paymasters as have been or shall or may from time to time be given by us or the high treasurer or commissioners of his majesty's treasury for the time being for that purpose: And we do hereby direct and appoint that the yearly fee or salary of 400*l.* shall be paid to each of them the said E. H. N., H. J., and W. C. Smyth, to be retained, kept, and received by the said E. H. N. and H. J. from the time the same was last paid unto them, and by the said W. C. Smyth from the day of the date hereof, quarterly, out of the monies that have been imprested to the said J. P., E. H. N., and H. J., or that shall from time to time be imprested to the said E. H. N., H. J., and W. C. Smyth, *during their continuance in the said trust*, and to be allowed on their account or accounts accordingly: Provided always, and it is hereby meant and intended that the said W. C. Smyth shall not intermeddle in the execution of the said office jointly with the said E. H. N. and H. J. until he shall have given such security for the due and faithful performance thereof as shall be approved by us or the

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high treasurer or commissioners of his majesty's treasury for the time being."

It was admitted upon the trial that the plaintiff had, under the above instrument, performed the duties of the office of one of the paymasters of exchequer bills, and received the salary and emoluments thereof, from the 21st June, 1811, to the 11th June, 1824, when he was dismissed. It did not, however, appear that any misconduct was imputed to him.

E. H. Nevinson, one of the paymasters of exchequer bills, who was called on the part of the plaintiff, stated, that he was appointed to that office in the year 1810, in the room of one Z. Z., who was removed by the lords commissioners for misconduct; and that the removal of that gentleman was the result of an investigation into his official conduct before a committee of the House of Commons. The witness then produced the instrument under which he was appointed to the office, by which instrument, reciting that under which J. P., J. C., and Z. Z. were appointed, and that the same was *thereby revoked and determined*, the witness together with J. P. and J. C. were constituted and appointed paymasters of exchequer bills, under the like provisions as are contained in the instrument above set forth. The witness further stated that he had held his office of paymaster from the date of his appointment to the present time, and that during the whole of that period there had always been three paymasters of exchequer bills, and never more; that he had never heard of there having been at any one time prior to the 11th September, 1810, more than three paymasters of exchequer bills; that, from June, 1811, to June, 1824, the plaintiff, in conjunction with H. J. and the witness, had acted as the three paymasters of exchequer bills; that the plaintiff ceased to act as one of such paymasters in June, 1824; that, on the 5th July, 1824, the defendant entered upon the duties of the office of one of the three paymasters of

exchequer bills so previously exercised by the plaintiff; that there was a certain iron chest in the office of the paymasters of exchequer bills, in which was deposited a great portion of the treasure intrusted to their charge; that there were three keys to the said iron chest, one of which was uniformly held by each of the three individuals acting as paymasters; that, immediately upon the defendant entering upon the duties of a paymaster of exchequer bills, the same key which had been previously held by the plaintiff was delivered to the defendant and retained by him; that the defendant, in conjunction with H. J. and the witness, had acted as the three paymasters of exchequer bills from the 5th July, 1824, up to the present time; and that the defendant had, from the 5th July, 1824, up to the present time, been performing the same duties which would have been performed by the plaintiff had he continued to act in his said office. It was admitted that the defendant had been exercising the said office and receiving the emoluments thereof from the 5th July, 1824, up to the time of the commencement of the action; and that the defendant had received during such period the total sum of 3,040*l.*, for salary and extra allowances upon the fundings of exchequer bills in respect of the said office.

On the part of the defendant, an instrument was produced, bearing date the 5th of July, 1824, whereby, after reciting the appointment of E. H. N., H. J., and the plaintiff, to the office of paymasters, *and that the plaintiff had resigned*, the defendant was appointed paymaster together with the said E. H. N. and H. J., in the usual manner.

The plaintiff, on the authority of the statute 48 Geo. 3, c. 1, ss. 10, 11, and 12, insisted that the tenure upon which he held the office of paymaster was during good behaviour, and not merely at the pleasure of the lords commissioners of the treasury.

The statute states in the preamble, that "it is expedient that *permanent* regulations should be established in rela-

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tion to the making out, issuing, and paying off all exchequer bills which may hereafter be issued for the raising of any money under the authority of parliament."

Section 10—after reciting, that, "by reason of the multiplicity of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the Exchequer; and that therefore, and to the end the Exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills, and other charges attending the same"—enacts "That the commissioners of the treasury shall and may from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they shall deem necessary, to pay off and discharge the principal sums which shall from time to time be in course of payment upon any exchequer bills, and to pay the interest due thereon, and the premium or premiums, rate or rates, which, according to any contract or contracts made or to be made for exchanging and circulating the said bills, or any of them, shall be due or payable to such contractors; and to take in and put upon a file or files from time to time all such bills as shall be paid off, to be cancelled, as the commissioners of the treasury shall direct; and to do and perform or cause and procure to be done and performed such other matters and things in relation to the said bills, or the principal and interest therein to be contained, as to the said commissioners of the treasury shall seem meet and shall be by them directed to be done and performed by such paymaster or paymasters, comptroller or other officers and clerks for the time being: all which payments shall be made at an office to be kept in or near the receipt of the Exchequer at Westminster for that purpose; and that the commissioners of the treasury

shall take or cause to be taken security from every person so constituted or appointed, for his duly paying, answering, and accounting for all the monies which he shall receive, and for his true and faithful performance of his office or trust."

Section 11 enacts "That the said paymaster or paymasters shall be subject and liable to such inspection, examination, and control, and audit, and to such rules in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster, as the commissioners of the treasury shall think fit or reasonable to establish or appoint from time to time for the better execution of the intent and end of this act and the satisfaction of the proprietors of exchequer bills."

Section 12 enacts, "That, as well the person or persons constituted or to be constituted paymaster or paymasters, as also the person or persons appointed or to be appointed to examine and control the receipts, payments, and acts of such paymaster or paymasters, shall severally have and receive for the service of themselves and of the officers and clerks to be employed under them respectively, and for such charges as shall be necessarily incident to the execution of their respective offices, such salaries, rewards, and allowances, as the commissioners of the treasury for the time being shall judge to be reasonable and shall direct to be allowed to them the said paymaster or paymasters or comptroller, or to any other person or persons employed or to be employed under the authority of this act or of any act or acts of parliament in relation to the making out or paying off exchequer bills; and it shall and may be lawful for such person or persons respectively to accept and receive any such salary, reward, or allowance, any former law, statute, or provision to the contrary notwithstanding."

The Lord Chief Justice directed the jury—first, that, by the true intent, meaning, and legal construction of the

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several clauses of the above-mentioned act, the tenure of the office of the paymaster or paymasters of exchequer bills is in law *during pleasure*—secondly, that, by the legal construction of the above-mentioned deed-poll bearing date the 21st June, 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills only during the pleasure of the lords commissioners of his majesty's treasury—thirdly, that the above-mentioned deed-poll, bearing date the 5th July, 1824, was a legal revocation of the above-mentioned deed-poll bearing date the 21st June, 1811—fourthly, that the allegation contained in the above-mentioned deed-poll bearing date the 5th July, 1824, viz. that the plaintiff *had resigned* his said office of paymaster of exchequer bills, was a matter of no importance to the issue between the said parties—fifthly, that there was no fact at issue between the said parties for the consideration of the jury—sixthly, that there ought to be a verdict for the defendant.

To this direction the plaintiff tendered the following exceptions—first, that, by the true intent, meaning, and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster or paymasters of exchequer bills is in law *during good behaviour*—secondly, that, even had the said act impowered the lords commissioners of his majesty's treasury to revoke and determine at pleasure the appointment of a paymaster of exchequer bills, no such power having been reserved in the above-mentioned deed-poll bearing date the 21st June, 1811, the lords commissioners of his majesty's treasury had not by law the power to revoke and determine the same at pleasure; and further, that, there not being any limitation of estate expressed in the above-mentioned deed-poll bearing date the 21st June, 1811, by the delivery of such deed-poll a *freehold* in the said office of paymaster of exchequer bills passed to the plaintiff—thirdly, that, admitting, for the sake of argument, that, by the true intent, meaning,

and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster or paymasters of exchequer bills is in law during pleasure; and admitting further, for the sake of argument, that, by the above-mentioned deed-poll bearing date the 21st June, 1811, he the plaintiff had an estate in his said office of paymaster of exchequer bills only during the pleasure of the lords commissioners of his majesty's treasury; still the lords commissioners of his majesty's treasury who executed the above-mentioned deed-poll bearing date the 5th July, 1824, not having therein or thereby revoked or determined the above-mentioned deed-poll bearing date the said 21st June, 1811, the above-mentioned deed-poll bearing date the said 5th July, 1824, is not a legal revocation of the above-mentioned deed-poll bearing date the said 21st June 1811—fourthly, that the lords commissioners of his majesty's treasury who executed the above-mentioned deed-poll bearing date the said 5th July, 1824, having therein and thereby founded their right to execute the same solely upon the allegation that the plaintiff *had resigned* his aforesaid office of paymaster of exchequer bills, *that allegation was the only matter of importance to the issue between the said parties*—fifthly, that the allegation made and contained in the above-mentioned deed-poll bearing date the said 5th July, 1824, viz. that the plaintiff *had resigned* his said office of paymaster of exchequer bills, was the fact and the only fact at issue between the said parties for the consideration of the jury—sixthly, that, as no evidence whatever had been given or attempted to be given at the trial of the said issue, in support of the truth of the allegation contained in the aforesaid deed-poll bearing date the said 5th July, 1824, viz. that the plaintiff had resigned his said office of paymaster of exchequer bills, the said Lord Chief Justice ought not to have directed the jury to find a verdict for the defendant, but ought to have directed the jury to find a verdict for the plaintiff.

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The exceptions came on for argument, on the 18th of January last, in the Exchequer Chamber, before the judges of the Court of Common Pleas and the Barons of the Exchequer, Mr. Justice Gaselee, Mr. Baron Bolland, and Mr. Baron Gurney being absent.

1st Exception.

The plaintiff, in person.—1. Under the statute 48 Geo. 3, c. 1, the tenure of the office of paymaster of exchequer bills is during good behaviour. It is laid down in the First Institute (*a*), that "the preamble of a statute, which is the beginning thereof, going before, is, as it were, a key to the knowledge of it, and to open the intent of the makers of the act; it shall be deemed true ,and therefore good arguments may be drawn from the same." The preamble of the act in question recites that "it was expedient that *permanent* regulations should be established in relation to the making out, issuing, and paying off all exchequer bills which might thereafter be issued for the raising of any money under the authority of parliament;" evidently contemplating the *permanency* of the regulations thereinafter directed. The 10th section provides "that the commissioners of the treasury *shall and may*, from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, &c.;" and the act was expressly passed *for the benefit of the public*. The words of that clause give the commissioners of the treasury no discretion save in the selection of such persons to fill the office of paymasters as they shall think fit for such office. In *The King* v. *The Commissioners of Flockwold Inclosure* (*b*), it

(*a*) Co. Litt. 79. a.

(*b*) 2 Chitt. Rep. 251. See also to the same effect, *Rex et Regina* v. *Barlow*, 1 Salk. 609. Com. Dig. tit. "Parliament," (R) pl. 22. *The King* v. *Havering Atte Bower*, 5 Barn. & Ald. 691. *The King* v. *The Mayor &c. of Hastings*, 1 Dow. & Ryl. 148. *Attorney General* v. *Lock*, 3 Atk. 166. *De Beauvoir* v. *Welch*, 7 Barn. & Cress, 266; 1 Man. & Ryl. 81—"The words 'shall

is said: "The words *shall and may* are imperative when the clause in a statute is for the public benefit." And the words "from time to time" can only be read as if followed by the words "as circumstances may occur to render it necessary, by death, resignation, or removal for misconduct," and cannot be taken as words of limitation of the estate of the person to be appointed. From the absence of an express power in the statute to revoke or determine at pleasure, the clear inference is, that the office was intended to be held during good behaviour; for, Lord Chief Justice Holt, in *Harcourt* v. *Fox* (*a*), distinctly lays it down that an indefinite limitation in an act of parliament confers an estate for life. The 11th section of the act provides that "the said paymaster or paymasters shall be subject and liable to such inspection, examination, control, and audit, and to such rules in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster, as the commissioners of the treasury shall think fit or reasonable to establish or appoint from time to time, for the better execution of the intent and end of this act, and the satisfaction of the proprietors of exchequer bills." This clause expressly declares the degree of authority which the commissioners of the treasury are to exercise over the paymasters; but, as the authority therein given does not extend to their dismissal *at pleasure*, no inference can legally be drawn that they have any such authority; for, expressio unius, or rather, particularis designatio, est exclusio alterius. Upon this principle it is, that, although a wife convicted of adultery, by the 13 Edward I, c. 34, forfeits her *dower*, she does not thereby forfeit her *jointure*, it not being expressed in the statute (*b*). It

and may,' in an act of parliament, are to be construed as imperative, unless it appears that the legislature did not intend them to be so; as, if they were accompanied by the words 'if it shall be deemed proper. &c.'"

(*a*) 1 Show 531.

(*b*) *Sidney* v. *Sidney*, 3 P. Wms. 277.

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is a fundamental rule, in the construction of statutes, that penal statutes are to be *strictly*, and remedial *liberally* construed. Lord Coke says (*a*): "There are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief; and it is the business of the judges so to construe the act as to suppress the mischief and to advance the remedy." So in the case of *Johnes* v. *Johnes* (*b*) it is said: "In the case of a remedial statute, every thing is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it:" and in *Atcheson* v. *Everitt* (*c*), Lord Mansfield says: "In remedial cases, the construction of statutes is extended to other cases within the reason or the rule of them. But, where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction." Before the passing of the act in question, the tenure of the office of paymaster of exchequer bills was clearly during pleasure; for, the lords of the treasury, by whom they were appointed, held their offices only during the pleasure of the crown, and therefore could not confer a more enlarged estate. The mischief intended to be remedied by the act was the absence of *permanent* regulations with regard to the matters referred to in the act. The remedy to be provided could not be better attained than by giving the paymasters, by whom the principal objects of the act were to be carried into effect, a permanent and certain tenure in their office. Lord Chief Justice Holt, in *Harcourt* v. *Fox*, speaking of offices for life, says: "In this respect the wisdom and policy of the law is very great; because, when

(*a*) 3 Rep. 71.—Co. Litt. 11, 42. (*b*) 3 Dow, 15.
(*c*) Cowp. 391.

men hold their offices for life, it is an encouragement for the faithful execution of their duties. It it then also they acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not being liable to be displaced at the pleasure of those who put them in. And the grant shall be construed most favourably to answer the intent of the law makers, whose design is to have the office well supplied, which will be best effected when the officer has an estate for life. I am the more inclined to be of this opinion, because I knew the temper and inclination of the parliament at the time when this act was made. Their design was, that men should have places, not to hold precariously or determinable upon will and pleasure, but have a certain durable estate, that they might act in them without fear of losing them. We all know it; and our places as judges are so settled, only determinable upon misbehaviour. Contemporaria expositio legis est optima—a contemporary exposition of a law, if there be any question about it (as our books tell us) is always the best; because the temper of the law makers is then best known." If, therefore, the legislature had intended the office of paymaster to be held during pleasure only, they would have expressed that intention in less equivocal language. The 11th section specifies in express terms the nature of the authority and control which the lords of the treasury shall have over the paymasters. This would have been altogether unnecessary if the estate in the office were only during the pleasure of the lords of the treasury; for, the paymasters would then, ex necessitate, have been subject and liable to such inspection, examination, control, and audit, &c., as are expressed in that clause. All statutes are to be so construed as, if possible, to give a sensible meaning to every part. Mr. Justice Blackstone (*a*), upon the authority of

(*a*) 1 Bla. Com. 89.

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Lord Coke (*b*), lays it down, that "one part of a statute must be so construed by another that the whole way if possible stand, ut res magis valeat quam pereat. As, if lands be vested in the king and his heirs, by act of parliament, saving the right of A., and A. has at that time a lease of it for three years, here A. shall hold it for his term of three years, and afterwards it shall go to the king, for, this interpretation furnishes matter for every clause of the statute to work and operate upon. But a saving totally repugnant to the body of the act is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases, the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king." The construction of a statute may be helped by others that are in pari materia: and it will be found, that, wherever the legislature intended the appointment of a public officer to enure during pleasure only, the language has been express to that effect; as will be seen from the following instances:—25 Geo. 3, c. 10, s. 7—26 Geo. 3, c. 57, s. 14; c. 101, s. 5—38 Geo. 3, c. 86, s. 4—39 Geo. 3, c. 13, s. 117; c. 21, s. 8—42 Geo. 3, c. 116, ss. 72, 75—46 Geo. 3, c. 21, ss. 2, 4; c. 119, ss. 1, 5, 6, 7—46 Geo. 3, c. 101, s. 6; c. 106, s. 2—47 Geo. 3, c. 12, s. 1—48 Geo. 3, c. 9—49 Geo. 3, c. 120, s. 74—50 Geo. 3, c. 43, s. 11; c. 72, s. 1; c. 103, ss. 27, 45—51 Geo. 3, c. 15, ss. 5, 7; c. 35; c. 71, s. 2—52 Geo. 3, c. 44, ss. 1, 4, 9, 10; c. 126, ss. 2, 5; c. 134, ss. 2, 5—53 Geo. 3, c. 107, ss. 1, 4; c. 116, s. 1; c. 121, s. 6—54 Geo. 3, c. 114, ss. 3, 12; c. 131, ss. 1, 6; c. 157, ss. 2, 3, 8—55 Geo. 3, c. 1, ss. 1, 7; c. 42, ss. 10, 38; c. 81; c. 107, ss. 1, 4; c. 138, s. 6; c. 190; c. 191, ss.

(*a*) 1 Rep. 47.

1, 2—56 Geo. 3, c. 56; c. 62, s. 1; c. 63, s. 6; c. 84, s. 1; c. 128, s. 9—57 Geo. 3, c. 34, ss. 6, 8; c. 107, s. 7—58 Geo. 3, c. 20, ss. 2, 21, 22; c. 61, s. 1; c. 72, ss. 1, 2, 4, 23; c. 100, ss. 1, 6—59 Geo. 3, c. 98, s. 11; c. 120, s. 1; c. 135—1 Geo. 4, c. 39, ss. 1, 4; c. 49, s. 1; c. 69, s. 6; c. 112, ss. 2, 5, 25; c. 113—1 & 2 Geo. 4, c. 57, s. 8—3 Geo. 4, c. 100, s. 17; c. 113, s. 19—4 Geo. 4, c. 23, ss. 1, 5; c. 90, ss. 4, 9; c. 97, s. 5—5 Geo. 4, c. 67, s. 2; c. 82, ss. 1, 2; c. 92, s. 8—6 Geo. 4, c. 106, ss. 2, 4, 7; c. 122—7 Geo. 4, c. 62, s. 2—7 & 8 Geo. 4, c. 53, ss. 1, 4; c. 55, ss. 2, 8; c. 58, s. 3; c. 65, s. 4—9 Geo. 4, c. 41, s. 7—10 Geo. 4, c. 44, ss. 1, 10; c. 50, ss. 12, 18—11 Geo. 4 & 1 Will. 4, c. 14, s. 10; c. 27, s. 15—1 Will. 4, c. 8, ss. 1, 2, 3—1 & 2 Will. 4, c. 17, ss. 1, 3.

In conformity with this doctrine, the absence of any words of limitation of estate of the paymasters of exchequer bills, in the act now under consideration, is the most conclusive evidence that the legislature intended that the tenure of that office should be during good behaviour; for, if such had not been their intention, it would have been so stated in express terms, as has been done in the numerous instances above referred to.

2. There being no limitation of estate expressed in the instrument under which the plaintiff was appointed paymaster of exchequer bills, by the delivery of the deed a freehold in such office passed to the plaintiff. "If a common person grants a rent or other thing that lies in grant, without limitation of any estate, by the delivery of the deed a *freehold* passes (*a*)." The statute 48 Geo. 3, c. 1, empowers the lords of the treasury, *by writing under their hands*, to constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters. In the present instance, they have gone beyond the mere words of the act, and have added sealing, thereby giving to the instrument an increased effect. The act gives no

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(*a*) Danv. 45. a.

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power of revocation: the deed, therefore, could not legally reserve such a power. In the case of *Wall* v. *Thurborne* (*a*), it is said: "A person having only an authority to *execute*, cannot annex a power of revocation when he executes it:" and in *Worrall* v. *Jacob* (*b*), that "a deed executed according to power, containing no clause for power to revoke, it cannot be revoked though the original power contained such clause."

3rd Exception.

3. The plaintiff's appointment, being by deed, could only be revoked by deed. The instrument by which the defendant was appointed to the same office could not operate as a revocation, there being no express words therein to that effect. The lords of the treasury have thought fit to found their right to appoint the defendant, upon an allegation that the plaintiff's appointment was vacated by his resignation—an allegation of the truth of which no evidence was offered on the trial.

4th Exception.

4. In Littleton (*c*) it is laid down "that a deed-poll is the sole deed of him that makes it; and the words thereof shall be said to be his words, and bind him only." So, in *Browning* v. *Beeston* (*d*), it is said: "In a deed indented, the words shall not be taken most strongly against one, and beneficially for another, as the words of a deed-poll shall; for, there the words shall be taken most strongly against the grantor." In Cruise's Digest (*e*), the rule is thus stated: "A person shall always be estopped by his own deed; that is, he shall not be allowed to aver any thing in contradiction to what he has once so solemnly and deliberately avowed." And in *Rees* v. *Lloyd* (*f*), Lord Chief Baron Macdonald, in giving judgment, says: "From Rolle's Abridgment, 872, it would appear that there is a distinction between a general and a particular recital; and though a general recital will not work an estoppel, yet the

(*a*) 1 Vern. 355.
(*b*) Meriv. 256.
(*c*) Section, 370.
(*d*) Plowden, 134.
(*e*) Vol. iv. p. 307. And see Co. Litt. 352. a.
(*f*) Wightw. 123.

recital of a particular thing will have that effect." In the deed-poll under which the defendant claims, the grantors assert, as the foundation of their right to appoint him, that the plaintiff *had resigned;* the only material question therefore was, whether the plaintiff had, by such alleged resignation, given the lords of the treasury the right they asserted. The right thus asserted and particularly recited, according to the authorities above referred to, effectually estopped the grantors, and consequently the defendant, from setting up any other right, either in law or of fact, to justify the granting of the deed of the 5th July, 1824.

5. The grant to the defendant was of that which had before been granted to the plaintiff—the deed of the 5th July, 1824, expressly so states it; and therefore, unless the previous grant to the plaintiff was dissolved, the grant to the defendant was void. It is laid down in Dyer (*a*), that, "if a man grant that to one which he hath before granted to another for the like term, the second grant will be void." And it cannot be contended that the deed upon which the plaintiff's title rested was destroyed by the mere recital in the subsequent deed, to which the plaintiff was neither party nor privy. In *Battersbee* v. *Farrington* (*b*), it was holden that a recital in a settlement after marriage of ante-nuptial articles is conclusive against all persons claiming under the settlor; but is not binding upon creditors. In that case the settlement contained a recital that it was made in pursuance of articles entered into before the marriage, but they were lost: and the question was whether the recital would be evidence against creditors, so as to establish the deed against them. The Master of the Rolls, Sir Thomas Plumer, stated the distinction to be, "that, against all persons claiming under the settlor, the recital was conclusive; but that it would be difficult to

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(*a*) Dyer, 23. (*b*) Swanst. 106—113.

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maintain that a recital in a *post*-nuptial settlement of *ante*-nuptial articles, of the existence of which there was no distinct proof, would be binding upon creditors; for that such a doctrine would give to every trader a power of excluding his creditors by a recital in a deed to which they were not parties."

Mr. *Wightman*, for the defendant.—The material questions to be considered are—first, whether, upon the proper construction of the statute 48 Geo. 3, c. 1, the office in question was held for life or during pleasure only—secondly, whether or not the appointment of the plaintiff was revoked by that of the defendant—thirdly, whether money had and received will lie to recover from the defendant the salary and emoluments received by him during his continuance in the office.

1. Whether or not the lords of the treasury had power to revoke the appointment of the plaintiff, depends wholly upon the construction of the 10th, 11th, and 12th sections of the 48 Geo. 3, c. 1. The 10th section recites, that, "by reason of the multiplicitly of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the exchequer;" and then goes on to impower the lords of the treasury, from time to time, by writing under their hands, to constitute and appoint such person or persons as they should think fit to be the paymaster or paymasters. The number of paymasters is not limited: the lords of the treasury may appoint a fewer or greater number according to the press of business. It is true that the statute has not pointed out how these officers are to be removed; but the 12th section clearly shews that it never could have been intended that their appointments should be for life. That section provides that the paymasters and other officers to be appointed shall receive such salaries, rewards, and allow-

ances, as the commissioners of the treasury *for the time being* shall judge to be reasonable and shall direct to be allowed to them. It would be absurd and inconsistent to give them the power to deprive the paymasters of their salaries, and not that of removing them from their office.

2. Unquestionably the lords commissioners of the treasury have not in express terms revoked the appointment of the plaintiff. But the defendant was appointed in the place of the plaintiff: the latter grant therefore operated as a virtual revocation of the former one. The allegation in the recital of the second grant, that the plaintiff had resigned, was not traversable; it was surplusage.

3. At all events, if the appointment of the plaintiff is unrevoked, he is not in a situation to maintain this action; for, in that case, the plaintiff still remains one of the paymasters. The assumption upon which the action proceeds is, that the defendant is intruding into the office of the plaintiff, and has received the salary and emoluments that are of right due to the plaintiff. But, if the commissioners of the treasury are not limited in the number of paymasters to be appointed, it follows that the defendant has been appointed to a distinct office from that which was formerly held by the plaintiff; and the money received by the defendant is the amount of salary and allowances received by him in respect of his own appointment.

The plaintiff was heard in reply.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This case comes before us from the Court of King's Bench, and the questions raised upon the record arise upon a bill of exceptions tendered by the plaintiff below, who is also the plaintiff in error, to the directions given to the jury on the trial of the cause by the late Lord Ten-

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1st Exception.

terden, then Chief Justice of the Court of King's Bench. The plaintiff, at the trial of the cause, took five exceptions to the direction given by the Chief Justice to the jury; of which the first was in substance this, that, by the legal construction of the several clauses of the statute 48 Geo. 3, c. 1, the tenure of the office of one of the paymasters of exchequer bills is not, as was stated by the Chief Justice to the jury, "during pleasure only," but a tenure "during good behaviour." Upon this, the first exception, and, by far the most important, as the answer to all the other exceptions appears to depend on this point, we are all of opinion, that, according to the legal construction of the statute above referred to, the tenure of the office of a paymaster of exchequer bills is a tenure during pleasure only, and not during good behaviour, or (which is the same in contemplation of law) for the life of the grantee. As the office of a paymaster of exchequer bills is not an antient common law office, of which the duration and the appointment are governed by antient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself. And, looking to the object of the act, the language of the act, and the various provisions contained in it, we think the meaning and intention of the legislature was, that the appointment should be during pleasure only, and not during the life of the grantee. The *object* of the new provision appears with sufficient certainty by the preamble to the 10th section—"Whereas, by reason of the multiplicity of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the Exchequer; therefore, and to the end the Exchequer may regularly be discharged of all the monies required by any act to be applied for

paying off any exchequer bills, and other charges attending the same, be it enacted, &c." The object therefore expressed by the legislature in this preamble was, to secure the due and regular payment of the exchequer bills from time to time directed to be paid off, by giving new and additional assistance to the officers of the receipt of the Exchequer whenever such assistance should be necessary. The assistance contemplated by the act was necessarily uncertain both in its extent and its duration. The issue of exchequer bills might at one time and under one state of circumstances be much larger than at another: it might be large in time of war, inconsiderable in time of peace: and consequently the regular discharge of the Exchequer of all monies applied to the payment of exchequer bills might require at one time a greater and at another a smaller number of officers. Any given number of officers, therefore, however well adapted to the exigencies of the public at the time of their appointment, might be insufficient for the dispatch of business, or might be unnecessarily large, at a subsequent period. Indeed, it is within the reach of possibility, that all the exchequer bills might be paid off, and no issue of any new bills take place; in which case, the officers of the receipt of the Exchequer would stand in need of no assistance whatever. The object, therefore, of the act could not be, that any certain, definite number of paymasters and other officers should be permanently appointed; but that there should at all times be a number adequate and sufficient, and not more than adequate and sufficient for the regular payment of the bills which might be outstanding at any particular time. The *language* of the enacting part of the section leads to the same conclusion. It is enacted that the commissioners of the treasury "shall and may" (which, for this purpose, may be taken to be compulsory on them), "from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to

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be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they shall deem necessary," to pay off the exchequer bills in the particular manner stated in the 10th section of the statute. The enacting words of the clause, therefore, are equally free from any restriction as to the number of paymasters or other officers. Under these words, it might perhaps be contended that they could appoint *but one comptroller*, as only one appears to be mentioned; but they might at all events appoint as few or as many *paymasters and other officers and clerks* as the exigency of the public service might require. They might begin with appointing *one* paymaster only, if they thought one paymaster and the clerks and officers under him sufficient at first; and when need required they might appoint another paymaster; and so on, from time to time, until there were as many as they thought necessary. Such is the obvious and necessary construction of the enacting words of this section.

The object, therefore, of the legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the Exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour; unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be completely attained; for, if the appointment is necessarily during good behaviour, that is, for life, the commissioners of the treasury might indeed always *increase* the number when the service of the public demanded more; but they could never *reduce* the number, when, from new circumstances, it became greater than the performance of the public service required. It is therefore upon the principle that the object of the act cannot be completely carried into effect, if the commissioners of the treasury have only a power to appoint, but no power to remove, that we hold

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the construction of the act to be, that the power to appoint is a power to appoint during pleasure only, and not for life. Again, the power given to the commissioners of appointing paymasters is expressed in the enacting part of the 10th section in precisely the same language as that which authorizes them to appoint "such other officers and clerks as they shall deem necessary." The same words in the same sentence must receive the same construction: but it would surely be an unreasonable construction of the clause to say that *all the officers and clerks* appointed to assist the paymasters had a freehold interest in their office, and were not removable at the pleasure of the commissioners. The provisions contained in the 12th section of the act appear to us to lead to the same conclusion. By that section, the paymasters are to have and receive for their services such salaries, rewards, and allowances as the commissioners of the treasury for the time being shall judge to be reasonable and shall direct to be allowed to them. The general terms of this provision include an authority to diminish or to increase from time to time the salaries of the paymasters just as the nature of their services deserves. The commissioners, therefore, under this section, might undoubtedly reduce the salary to a nominal sum, if the duties of the office should become merely nominal. But it is surely much more consistent with the general object of the act, that they may altogether dispense with the officers themselves when they think them no longer of use, that is, that they should have the power of removing them at pleasure, than that the officers should continue to hold their offices for life, without any real salary, and without any duty to perform: for, it would seem to be an unreasonable construction of the act, to hold, that, if ten paymasters had been appointed when ten were necessary, and, from a change of circumstances, one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but

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must still retain the full number, at a tenth part of the salary to each. We therefore think that the meaning and intention of the statute was, and consequently that the necessary construction of it must be, that the office so newly created was to be determinable at pleasure, and was not an office for life.

It is objected, however, by the plaintiff in error, that the general preamble to the act contemplates the establishment for the first time of *permanent* regulations for the making, issuing, and *paying off* exchequer bills; and it is contended that the commissioners of the treasury have consequently only a power to select proper persons, not a power to displace or remove them. But we think this consequence does not necessarily follow. It may be true that the commissioners of the treasury for the time being have under the act a permanent power of selecting paymasters and other officers, and of making regulations; but it does not follow that the office itself of paymaster should be on that account permanent during the life of the appointee. The *regulations* established under the act for the paying off exchequer bills will be just as permanent whether the commissioners have the power to appoint paymasters for life, or during pleasure only. All that the statute contemplates is, the permanency of the office, notwithstanding the change by the appointment of new sets of commissioners of the treasury; not the permanency of the office in a particular individual, or that the regulations which have been once made should be considered unalterable.

It is further objected, that, by the 11th section, the paymasters are made subject to such rules and regulations as to the performance of the duties of their office as the commissioners shall think fit or reasonable to establish for the better execution of the act and the satisfaction of the proprietors; and it is contended that such provisions would be altogether unnecessary if the commissioners have

the power of dismissal, or if the appointment were during pleasure only. If, indeed, acts of parliament never contained any thing but what was strictly necessary, this argument might be entitled to some weight: but, if the necessary inference to be drawn from the other parts of the act is, as we conceive it to be, that the commissioners can appoint during pleasure only, then this provision, even though in strictness unnecessary, must be considered as introduced pro majori cautela only. But we think this clause is not without its use, even though the office of paymaster should be held to be an office during pleasure; for, under it, the commissioners of the treasury would have power to make regulations to bind successive paymasters once for all, instead of making them de novo upon each new appointment.

It is then argued, that, as no mention is made in this section of the power of dismissal, it must be considered that none such exists. The answer to this argument appears to be, that the clause only refers to the duty of the officer whilst he continues such officer, and such particulars only are mentioned as equally relate to the duties of the office whether it be for life or during pleasure; the clause being framed with reference to the duties of the office, not to the duration of it. Upon the whole, therefore, that clause seems to leave the question where it was before.

It is further objected that the statute is remedial, and is therefore to be construed liberally; that one of the mischiefs intended to be remedied, was, the want of permanency of the office of paymaster, which before the passing of the act was at pleasure only, being limited in duration to the continuance in office of the commissioners of the treasury by whom such appointment was made. It may be granted that one object of the act was, to make the office permanent: but, if the officer continues to hold his office (as undoubtedly he now will) notwithstanding the change of the commissioners of the treasury, that object

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is equally answered whether the office itself be for life or during pleasure only. But then, it is argued that the appointment for life is the only or at all events the best mode by which the persons appointed can be expected to become qualified to perform the duties of the office. It may be, however, at least doubtful whether such conclusion is just, when applied to an office which is merely ministerial, and not in its nature demanding any very great extent of experience or ability, but depending for its discharge in a more especial manner on the industry, assiduity, and integrity of the officer.

Lastly, it is argued, that, if the terms of this statute be doubtful, it ought to be construed by analogy to various other statutes cited on the part of the plaintiff, in which a similar provision as to the appointment of officers has been made; and in all of which, it is urged, that, whenever it is intended there should be a power of revocation or dismissal, such power is expressly reserved by the act, or the appointment itself is directed to be made during pleasure only. This kind of argument is well founded only in those cases where the construction of the statute is doubtful or obscure: but, in the present case, we think the construction of this statute, for the reasons before given, is clear and unambiguous. Where, however, such powers of revocation or dismissal are expressly given by any act in which the necessary object of the act itself implies, as here, that the officer shall be appointed during pleasure only, we think, in such cases, the insertion of the power of dismissal or of the clause that the appointment is held during pleasure only, must be referred to the principle before adverted to, viz. that the provision is inserted ex abundanti, and pro majori cautela only.

2nd Exception.

As we think, for the reasons above given, the first exception must be over-ruled, those exceptions which follow will require less discussion; for, as to the second exception, viz. that, upon the legal construction of what is called

the deed-poll by which the plaintiff was appointed, he had a freehold in his office, the first observation that arises is, that the instrument is no deed at all. The mere annexation of a seal will not make an instrument a deed which is not a deed in its own nature. An award by an arbitrator, although under seal, does not thereby become a deed. And, in the present case, where the commissioners have merely a statutory power to constitute paymasters "by writing under their hands," the annexation of a seal without the requisition or authority of the statute, will not give a different effect, or impart different legal consequences to the instrument by which the authority is executed, than if the commissioners had appointed by writing under their hands only. But the more direct answer to this exception is, that, if the commissioners had no authority by the statute to appoint for life, whatever may be the frame of the instrument by which they make the appointment, it cannot create a greater estate than they had power by the statute to grant.

The third exception to the charge of the Lord Chief Justice is, that, even if the deed-poll of the 21st June, 1811, granted the office to the plaintiff during pleasure only, still the deed-poll of the 5th January, 1824, is no legal revocation of such pleasure, inasmuch as it contains no distinct clause of revocation, and no provision which rendered such clause unnecessary. But, when it is considered that the subsequent appointment is that of a new officer in the stead and place of Mr. Smyth, it seems to bear so close an analogy to the case of tenancy at will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former: at all events, as the appointment of the defendant to the *same office*, and to the receipt of the *same salary*, is the sole ground upon which the plaintiff founds his right to recover in this action, we think it cannot be contended

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by him that such new appointment, inconsistent with the continuance of the former, is not a sufficient revocation in fact of the pleasure of the commissioners that the plaintiff should continue in his office.

4th Exception. The fourth ground of exception is, that the commissioners having stated in the appointment of the defendant that the plaintiff had *resigned* his office, and this allegation not having been proved, the subsequent appointment cannot operate as a revocation of the former. But we agree entirely in opinion with the late Lord Chief Justice, that the resignation was not a fact necessary to be proved by the defendant in this cause; and that, whether the plaintiff had resigned or not, the fact of the appointment of a successor to the same office, was a sufficient indication of the commissioners' pleasure that the plaintiff should no longer continue in the possession of the office.

5th Exception. And this gives the answer to the fifth and last exception taken, viz. that the defendant was bound to prove the fact of resignation. In the first place, it is no fact asserted by the defendant; but, secondly, and principally, it is a fact immaterial to the issue between the parties; for, as the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor.

But we think, independently of the reasons before given for over-ruling the several exceptions taken by the plaintiff at the trial, that, upon another ground, he is not entitled to the judgment of this Court: for, either the defendant has, as the plaintiff contends, been put into his the plaintiff's place, and appointed his successor to the same identical office—and in that case the new appointment operates as a revocation of the plaintiff's grant; or the defendant has not been placed in the very same identical office—and in that case the plaintiff's grant is still unrevoked and in existence; the plaintiff is still one of the paymasters of exchequer bills; and, as the commissioners of

the treasury are not limited in the number of paymasters appointed, it follows that the defendant has been appointed to another and distinct paymastership from that of the plaintiff. Upon the latter supposition, the money received by the defendant has not been money received in respect of the plaintiff's office, as is the case where there can be but one officer, and the officer de facto has received the several fees paid for performing the duties of the office; but the money received by the defendant is the amount of salary and allowances received by him in respect of his own appointment; and, in that case, such money cannot be money had and received to the use of the plaintiff. And, indeed, we cannot but think that the decision at which we have arrived is no less consistent with the justice of the case than with the rule of law; for, it would have been most unjust, with respect to the present defendant, that, after having performed the duties of the office for nearly six years, he should be called upon to pay over the emoluments of it to the plaintiff, who had bestowed neither labour nor time in the execution of its duties; nor, for any thing that appears on this special verdict, had given any prenotice to the defendant of his intention to dispute his appointment.

Upon the grounds above stated, we think that the exceptions tendered at the trial are untenable, and must be overruled; and that, in no view of this case, can the plaintiff be entitled to judgment in his favour; but that the judgment of the Court below must be affirmed.

Judgment affirmed.

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[*In Error.*]

Replevin for taking and detaining the plaintiff's goods. Avowry, that the plaintiff was an inhabitant of the parish of A., and rateable to the relief of the poor in respect of his occupation of a tenement there; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*; that the defendant, as collector, gave him notice thereof, and demanded payment, which he refused; that he was duly summoned to the Petty Sessions to shew cause why he refused; that he appeared, and shewed no cause; whereupon a warrant was duly made under the hands of two justices of the peace, directed to the defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to the defendant, under which he as collector justified taking the goods as a distress, and prayed judgment and a return. Plea in bar, de injuria sua propria absque tali causa. Special demurrer, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not in a justification and claim of right:—*Held*, that the plea was good—affirming the judgment of the Court below.

THIS was an action of replevin for taking plaintiff's (below) goods and chattels in Verulam Buildings, Gray's Inn, and detaining the same against sureties and pledges.

The defendants (below) avowed and made cognizance (in the fourth avowry and cognizance), Bardons as collector of the poor rates of that part of the parish of St. Andrew, Holborn, which lies above the bars, in the county of Middlesex, and of the parish of St. George the Martyr, in the said county, and Jenkins as his bailiff—that the plaintiff was an inhabitant of the said part of the parish of St. Andrew, Holborn, and by law rateable to the relief of the poor of that part of the said parish and of the parish of St. George the Martyr, in respect of his occupation of a tenement situate in the said place in which, &c., and within the said part of the said parish of St. Andrew, Holborn; that a rate for the relief of the poor of that part of the parish of St. Andrew, Holborn, and of the parish of St. George the Martyr, was duly ascertained, made, signed, attested, allowed, given notice of, and published, according to the statutes; that, by the said rate, the plaintiff was, in respect of such inhabitancy and occupation as aforesaid, duly rated in the sum of 7*l.*; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the Petty Sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to shew cause why he refused payment; that he appeared and shewed no cause;

that a warrant was duly made, under the hands and seals of two justices of the peace for the county then present, directed to Bardons, as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant, as his bailiff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods.

The plaintiff below pleaded in bar, that the defendants below, of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, &c.

To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct matters—the inhabitancy of the plaintiff—his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance—the ascertainment, making, signing, assessing, allowance, notice, and publication of the rate—the rating and assessment of the plaintiff—the notice to him of the rate—the demand and refusal of the sum assessed—the summons—the appearance before the justices—the warrant of distress, and the delivery thereof to the defendant Bardons; and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly *in excuse* of the taking and detaining, and did not avow and justify the same, and claim a right to the goods and chattels by virtue of the statute.

To the fifth and sixth avowries and cognizances, which were similar to the fourth, the plaintiff pleaded de injuria; and there were special demurrers, assigning the same causes as above set forth.

The plaintiff below joined in demurrer. The case was argued in the Court of King's Bench in Michaelmas Term, 1831; and, in Hilary Term following, judgment was given

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for the plaintiff, upon the opinions of Mr. Justice J. Parke and Mr. Justice Patteson—Lord Chief Justice Tenterden dissentiente (*a*).

The case was brought by writ of error to the Exchequer Chamber, and was argued in Hilary Vacation and in Easter Term last.

Mr. Serjeant *Coleridge*, for the plaintiffs in error.—The principles and the policy of the laws of pleading are adverse to pleas of this description. The late Lord Tenterden, in delivering his judgment in this case, in the court below, thus expresses himself (*b*): "I consider the system of special pleading which prevails in the law of England, to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by jury; and that its object is to bring the case, before trial, to a simple, and, as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible." Nothing can more strongly instance the inconvenience of multiplicity of pleading than the present case, where many facts are put in issue that are foreign from the merits of the case, and which, from the lapse of time since the events took place, have become extremely difficult of proof.

A distinction exists between replevin and trespass. In trespass, where the plea consists of several distinct facts, all tending to establish one point of defence, the whole may be put in issue by the general replication de injuria sua propria absque tali causa: but, in replevin, where the defence consists not in mere matter of excuse for the taking, but a right of property in the goods is asserted, it is otherwise. The leading authority upon this subject is *Crogate's* case (*c*).

(*a*) See 3 Barn. & Adol. 2. (*b*) 3 Barn. & Adol. 26. (*c*) 8 Rep. 67.

That was an action of trespass for taking the plaintiff's cattle. The defendant pleaded a right of common in a copyholder over the locus in quo, by prescribing in the usual way in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied de injuria sua propria absque tali causa. Upon which the defendant demurred. On the part of the plaintiff, it was contended that the replication was good, because the defendant did not claim any interest, but justified by force of a commandment, to which de injuria sua propria absque tali causa may be fitly applied; and that the replication referred only to the commandment, and to no other part of the plea. It was held that the replication was insufficient. The resolutions were—First, "That absque tali causa doth refer to the whole plea, and not only to the commandment, for all maketh but one cause, and any of them without the other is no plea by itself. And therefore, in a false imprisonment, if the defendant justifies by a capias to the sheriff, and a warrant to him there, de injuria sua propria generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause), and matter of record ought not to be put in issue to the common people; but in such case he may reply de injuria sua propria, and traverse the warrant, which is matter of fact. But, upon such a justification by force of any proceeding in the Admiral Court, hundred or county court, &c., or any other which is not a court of record, there de injuria sua propria generally is good, for all is matter of fact, and all makes but one cause."—Secondly, "That, when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common or rent going out of the land, or any way or passage upon the land, &c., there de injuria sua propria gene-

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rally is no plea. But, if the defendant justifies as servant, there de injuria sua propria in some of the said cases, with a traverse of the commandment, that being made material, is good. For, the general plea de injuria sua propria &c. is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatsoever: et dicitur de injuria sua propria &c., because the injury properly in this sense is to the person, or to the reputation; as, battery or imprisonment to the person, or scandal to the reputation; there, if the defendant excuse himself upon his own assault, or upon hue and cry levied, there properly de injuria sua propria generally is a good plea, for, there the defendant's plea consists only upon matter of excuse." —Thirdly, "That, when, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally de injuria sua propria. The same law of an authority given by the law, as, to view waste, &c."—Fourthly, "That, in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single, for, parcel of the manor, demiseable by copy, grant by copy, prescription of common, &c., and commandment, would all be parcel of the issue." Where a trespass is complained of, and the excuse is under the title of another, there de injuria sua propria is the proper plea—*Chancey* v. *Win* (*a*). In *Taylor* v. *Markham* (*b*), in an action of trespass and battery, the defendant pleaded that he, at the time of &c., was seised of the rectory of D. in fee, and that at the same time and place where the trespass and battery were supposed, &c., corn was severed from the nine parts; and for that the plaintiff would have carried away his corn, the defendant there stood in defence thereof, and kept the plaintiff from carrying it away, so as

(*a*) 12 Mod. 580. (*b*) Cro. Jac. 224.

the harm which the plaintiff received was of his own wrong, &c. The plaintiff replied that the trespass and battery were done sans tiel cause alledg. &c.: whereupon the defendant demurred in law. And it was adjudged for the plaintiff; "for, it is not requisite in this case for the plaintiff to answer the defendant's title, because he doth not by this action claim any thing in the land or corn, but only damages for the battery, which is collateral to the title. And therefore the general replication is good. But, when the plaintiff makes a title in his declaration to any thing, and the defendant pleads another thing against it, the plaintiff must reply severally, and not say sans tiel cause, as it is in 14 H. 4 (*a*) and 16 Ed. 4 (*b*)." Here, an interest is claimed in the goods seized. In *Cooper* v. *Monke* (*c*), the plea justified under a distress for rent, and the general replication was held bad—"because this general replication, that they did it of their own wrong, without any such cause, &c., is never admitted when the defendants insist on a right, as they plainly do in the present case, but is only admitted when the defendants insist on a matter of excuse, as, that the plaintiff's fences are out of repair, in an action of trespass with cattle, or son assault demesne in an action of assault and battery." In *Chancey* v. *Wise*, Lord Holt says: "If one come into my house by my consent, and he will not go away when I would have him go, I may by authority in law turn him out; if he brings trespass for this, and I set out all the matter specially in my justification, de injuria sua propria generally will be a good plea; and the case of entering to see waste is upon a special reason; for, suppose the plaintiff were seised in fee, the pleading de injuria sua propria would involve the seisin in fee in the issue, which would be

(*a*) Year Book, 14 Hen. 4, fo. 32, pl. 45.

(*b*) Year Book, 16 Edw. 4, fo. 4, pl. 10.

(*c*) Willes, 52.

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hard to have the right of the fee tried in an action of trespass. But, when one justifies by virtue of a warrant of a justice of peace, it is quite another thing, because perhaps it may not be proper to involve the warrant in the issue." In *Fursdon* v. *Weeks* (*a*), in trespass for battery and false imprisonment, the defendant justified by virtue of a writ out of the King's Bench, and a warrant and arrest thereupon at D., and traversed all other places and times. The plaintiff replied de injuria sua propria absque tali causa. The defendant demurred and had judgment; "for, to thrust matter of record, and matter of fact, and varieties of matters, as, the warrant, the arrest, &c., at once in issue, is naught upon general demurrer, according to *Crogate's* case." In *Cockerill* v. *Armstrong* (*b*), it was held that de injuria sua propria absque &c. is not a good replication where it puts several matters in issue; as, where replied to a plea (to trespass for taking cattle) that A. was seised in fee of the locus in quo, and that the defendants as his servants took the horse damage feasant; nor can it be replied where the defendant, either in his own right, or as servant to another, claims an interest in the land or way &c.; nor where the plaintiff in his declaration makes a title to any thing and the defendant pleads another thing against it or in destruction of the cause of action; there the plaintiff must reply specially. And in *Jones* v. *Kitchen* (*c*), the plea de injuria sua propria absque tali causa to a cognizance for rent in arrear, was held bad on special demurrer. In Finch's Law (*d*), after stating, that, in all actions of trespass merely transitory, although the defendant pleads any special matter, the plaintiff may reply generally, except where the justification is by matter of record or writing (by which he means writing in the

(*a*) 3 Levinz, 65.

(*b*) Willes, 100. And see *Bell* v. *Wardell*, Willes, 202.

(*c*) 1 Bos. & Pull. 76.

(*d*) Page 396.

like nature), or by some title or license from the plaintiff himself, the learned author proceeds to state, that, in all local trespasses where title is claimed, the special matter must be answered; and "in replevin, which is *real*, the title or special matter must be always traversed." An avowry in replevin is in some respects the same as a declaration in trespass: this would not be a good plea in bar to an action of trespass. Mr. Serjeant Williams, in a note to the case of *Potter* v. *North*, says (*d*): "There is a difference between a justification to an action of trespass, and an avowry and cognizance; in trespass it is sufficient for the defendant to allege in his plea matter to excuse the trespass; but in replevin the avowant or person making cognizance is in the nature of a plaintiff; for, he is to have a return; and therefore the avowry or cognizance, which is in the nature of a declaration, must shew a good title in omnibus, and contain sufficient matter to entitle him to a return (*a*). Thus, in trespass, if the defendant justify for an amerciament in a court leet, he must set forth a warrant, for, he is a wrong-doer unless he acted by virtue of a warrant; but it is not necessary to aver the matter of the presentment, because, as to him, it is immaterial whether the offence was committed or not, so there was a presentment, and his plea is only to excuse the wrong; but, in an avowry or cognizance, the defendant ought to aver in fact that the plaintiff committed the offence for which he was amerced, because he is an actor, and is to recover, which can only be upon the merits (*c*)."

Mr. *Maule*, contrà.—All the authorities that are material to the question are so fully discussed and commented

(*a*) 1 Wms. Saund. 347 *b*, n. (3).

(*b*) *Goodman* v. *Ayling*, Yelv. 148.

(*c*) Citing *Matthews* v. *Carey*, Carth. 74; 1 Salk. 107; 7 Rep. 25 a.

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upon in the report of this case in the Court of King's Bench, that it will be unnecessary to recapitulate them. It is said that the object of pleading is to put one single fact only in issue. But many instances present themselves wherein a great variety of facts are alleged all tending to one issue. Under the general plea of nil debet, the defendant may give in evidence any thing to shew that at the commencement of the action the defendant was not indebted to the plaintiff. So, in trespass or in case, under the general issue, any number of facts may be proved in denial of the plaintiff's right of action. So, in a writ of right, upon the mise joined, the tenant may present any defence save a collateral warranty; and may put the demandant to proof of every single step of his title. The application of the rule as to pleading double is perfectly intelligible: a party is not thereby compelled to confine his defence to one *fact* only. With regard to the distinction taken between replevin and trespass, Lord Tenterden, in delivering his judgment in the Court below, says (*a*): "I would only add, that my view of the case would be the same if this were a replication to a plea in trespass, or if the defendant had pleaded instead of avowing, and so had not claimed a return of the goods." Suppose the plaintiff, instead of proceeding by replevin, had rescued the goods, and the defendants had brought a writ of rescous; in the writ their right to distrain would have been alleged precisely in the manner stated in this avowry, and all the facts would have been put in issue by the general issue. In *Collingwood* v. *Lowe*, which was an action of replevin wherein there was an avowry as in this case, de injuria was pleaded, and not demurred to. The plea had been drawn by Chambre with a special traverse, and Wallace, by whom it was settled, relying on *Chancey* v. *Win*, struck out the special traverse.

(*a*) 3 Barn. & Adol. 20.

Mr. Serjeant *Coleridge* was heard in reply.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question raised for our consideration upon this writ of error arises in an action of replevin in which Bardons, one of the defendants below, avows as collector of a poor rate, and Jenkins, the other defendant, makes cognizance as his bailiff, alleging, in the fourth avowry and cognizance, that the plaintiff below was an inhabitant of the parish, and by law rateable to the relief of the poor thereof in respect of his occupation of a tenement situate within the same; that a poor rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published, according to the statute; and that, by the said rate, the plaintiff was duly rated in the sum of 7*l.*; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the Petty Sessions to be held at a time and place duly specified, to shew cause why he refused; that he appeared and shewed no cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then present, directed to Bardons, the collector, commanding him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant acknowledged the taking of the goods; praying judgment, and a return, &c. The plaintiff pleaded in bar, that the defendants, of their own wrong, and without such cause as was alleged, took the plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause, that the plaintiff, by his plea in bar,

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sought to put in issue several distinct matters; and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same and claim a return. The plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers and joinders in demurrer. Upon argument before the Court of King's Bench, judgment was given in favour of the plaintiff below by two of the learned Judges of that Court; the late learned and much lamented Chief Justice, Lord Tenterden, having given judgment in favour of the defendants below. The question raised for determination upon the record is this, whether the general plea in bar pleaded by the plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not: and we are all of opinion that such plea in bar is a good plea, and that the judgment of the Court below must be affirmed.

It may be convenient, in the first place, to advert to the objection which relates to the form of action in which this general plea is used, viz. that it is in point of form an action of replevin, not an action of trespass; as to which we are of opinion that no sound distinction can be made in that respect; but that, wherever the facts pleaded in bar to an action of trespass for taking goods constitute such a defence that the plaintiff may, consistently with the rules of law, put the whole of them in issue by the general replication de injuria sua propria absque tali causa, we think the plaintiff may also do the same in his plea in bar to an avowry stating the same identical facts as a defence in an action of replevin. No case has been cited before us in which such general traverse of the facts stated in the avowry has been held bad simply upon the ground that the form of the action is replevin, not trespass: for, as to

the case of *Jones* v. *Kitchen* (*a*), the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special plea in trespass stating the same facts, as appears from the case of *White* v. *Stubbs* (*b*). It cannot, therefore, as it appears to us, be a safe ground of decision to rest the validity of the general traverse on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question whether they constitute one single defence or not, but upon the consideration that the question arises in an action of replevin. The only ground of distinction that has been suggested is, that the defendant in this case, by claiming a return of the goods, asserts a right and property in them, and therefore brings the case within the exception in *Crogate's* case—"that the defendant claims property or an interest in or out of the goods which have been taken." But, upon reference, as well to *Crogate's* case, where this exception to the general rule is laid down, as also to the several cases in which such exception has been held to apply, we think it is limited to instances in which the defendant has claimed by his plea an interest in the land or the goods before and at the time of the trespass complained of. In replevin, however, it is obvious that the defendant does not insist (in ordinary cases at least, and certainly not in the present case,) upon any right or interest he possessed in the goods before or at the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that the defendant has seized the goods which belonged to his tenant, the plaintiff; his sole object being, to satisfy the rent out of the tenant's property; and the prayer for a return of the goods, &c., is no assertion of right to or interest in the goods in himself,

(*a*) 1 Bos. & Pull. 76. (*b*) 2 Saund. 294.

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the defendant; but is a prayer that the *plaintiff's* goods may be returned by the sheriff, in order, so long as the common law on this subject continued, that they might be kept by the defendant as a pledge for the payment of the rent, and, since the alteration of the common law by the statute 2 W. & M. c. 5, in order that they may be sold by the defendant in satisfaction of the arrears of rent and the expenses. Indeed, it is evident that the claim of interest mentioned in *Crogate's* case as forming an exception to the application of the rule there laid down, must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put, of a right of common, or a right of way or passage, and the like; all of which, from their nature, must have existed in the party before the trespass was committed for which the action is brought. We think, therefore, no distinction can be satisfactorily laid down between the rule of pleading as to the point in question in an action of replevin and an action of trespass; but that the point to be determined is, whether, by the rules of pleading, the several facts alleged in the fourth avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass. And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, viz. that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact; yet we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in later times. And we feel ourselves, on that account, bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedent than by general principles of law. It is not necessary to refer to any earlier decision than that of *Cro-*

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gate's case as an authority upon the present question. Indeed, the Year Books cited in that case do not, upon reference, throw much light or any degree of certainty on the points there resolved. But, from the time of *Crogate's* case (6 James 1) down to the present period, the resolutions of the Court made in that case have, as to the greater part, been considered to be law. In *Crogate's* case, the defendant in an action of trespass for driving the cattle of the plaintiff, pleaded a right of common in a copyholder over the locus in quo, by prescribing, in the usual way, in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied de injuria sua propria absque tali causa; and, upon demurrer, it was adjudged that the general replication in that case was insufficient: and Lord Coke then proceeds to lay down four resolutions of the Court, in the course of which he thus states the nature of this general plea, viz.: "The general plea de injuria sua propria, &c., is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever. The resolutions of the Court are these four—first, that absque tali causa doth refer to the whole plea, and not only to the commandant; for, all makes but one cause, and any of them without the other is no plea by itself—secondly, it was resolved, that, when the defendant, in his own right, or as servant of another, claims any interest in the land, or any common, or rent going out of the land, &c., there de injuria sua propria, &c. generally is no plea; but, if the defendant justifies as servant, there de injuria sua propria, &c., in some of the cases, with a traverse of the commandment, that being made material, is good—thirdly, it was resolved, that, when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no inter-

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est be claimed, the plaintiff ought to answer it, and shall not reply generally de injuria sua propria, &c.: the same law of an authority given by law, as, to view waste, &c.—lastly, it was resolved, that, in the case at bar, the issue would be full of multiplicity of matter, when an issue ought to be full and single; for, parcel of the manor, demiseable by copy, grant by copy, prescription of common, &c., and commandment, will be all parcel of the issue."

The questions, therefore, appear to us to be these two alone—first, whether the facts pleaded in this avowry bring it within that description of plea to which the general replication is admitted in *Crogate's* case to apply—secondly, whether the case falls within any of the exceptions laid down by the Court in their resolutions in that case.

Now, the facts stated in the avowry are, the inhabitancy of the plaintiff in a certain parish, and his liability to the poor rate by reason of occupation; the making of a poor rate for the parish, with all the particular observances required by law; notice of the rate; the demand of payment, and refusal to pay; the summoning before the justices of the peace in Petty Sessions, to shew cause for his refusal, where no cause was shewn; the issuing of a warrant by the justices of the peace; the delivery of the warrant to one of the defendants; and the distress made by him and the other defendant as his bailiff. In the first place, these facts appear to us, in the language of *Crogate's* case, to consist merely "of matter of excuse, and of no matter of interest whatsoever." They fall within the principle of a justification under a proceeding in the Admiral's Court, the hundred or county court, or any other which is not a court of record where de injuria, &c. generally is good, "for, all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to: a justification under a distress

warrant for a poor rate must surely be the subject of a general traverse, if a justification under the process of the Admiralty Court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of the exceptions which are laid down in the leading case above referred to. The first is where the defendant in his own right or as servant to another claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, license, or gift from the plaintiff (*a*), or any sub-demise to the defendant (*b*). The answer, therefore, to this objection appears to be that the defendants in this case claim no such interest, nor any other interest of any kind in the goods taken; for, that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our opinion (*c*), to which we refer. The next exception is, where the defendant justifies under any authority or power mediately or immediately derived from the plaintiff; in which case, it is said, that, although no interest is claimed, the plaintiff ought to answer it, and shall not reply generally, de injuria sua propria. It would not have been necessary to advert to this exception, as the proceedings on the part of the defendants are manifestly not under any authority from the plaintiff, but directly against him, if Lord Coke had not proceeded to add: "The same law of an authority given by the law, as, to view waste." But the meaning of this distinction is explained by Lord Holt, in the case of *Chancey* v. *Win* (*d*), who says: "The case of entering to see waste is upon a special reason; for, sup-

(*a*) Bro. Abr. "De son tort demesne," 41.
(*b*) Id. Ibid. 53.
(*c*) *Ante*, p. 291.
(*d*) 12 Mod. 582.

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pose the lessor were seized in fee, such seisin in fee would be involved in the issue." That the dictum of Lord Coke cannot be intended of justifications under *all* authorities in law, generally, is abundantly clear from the instances already adverted to of justification under process of law against the person and against the goods of the plaintiff: so also of justifications by peace officers arresting upon breach of the peace, and the like: so also in the case of justification under a statute—see *Chancey* v. *Winn*, supra—in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it not equally be replied where the justification is under a distress for a poor rate, an authority of law? The last of the exceptions mentioned in *Crogate's* case is, that the plea would be full of multiplicity of matter. Whether this is or is not a ground of exception that applies to the present case, must depend upon the meaning of the word multiplicity in the resolution. If it intends that separate and distinct facts constituting altogether one defence cannot be included in the general replication, what becomes of the rule in *Crogate's* case altogether? Why did the discussion in *Crogate's* case take place, and why were the four resolutions made, when the single objection that the plea included more than one separate fact, would have been sufficient to have determined against the general traverse? How is this interpretation reconcileable with the various instances in which this general form of replication is confessedly held good—such as the justification under process issuing out of a court not of record? Where facts are stated in the plea mixed up with matter of record, or with the claim of interest, or under the authority of the plaintiff, it has always been allowed that the plaintiff might admit the fact which falls within the description of such exception, and traverse the remainder of the allegations of the plea, by limiting the traverse by the words " absque residuo causæ." How could this practice

of pleading be applied to the present case, where none of the facts alleged fall within the exception, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word "multiplicity;" and, consequently, that the resolution does not apply to this case. And such appears clearly to have been the opinion of the Court of King's Bench in two modern cases— *Robinson* v. *Raley* (*a*), and *O'Brien* v. *Saxon* (*b*).

Upon the whole, we think this case falls within the general rule laid down in *Crogate's* case; and that it is not touched by any of the exceptions there adverted to; and, consequently, that the judgment of the Court below must be affirmed.

Judgment affirmed (*c*).

(*a*) 1 Burr. 316.

(*b*) 2 Barn. & Cress. 908.

(*c*) In an action of assault and battery, de injuria is a good replication to a plea stating that J. E. and S. B. were possessed of a close, and that the plaintiff was making a noise &c., and the defendants, as servants of J. E. and S. B., and by their command, requested him to depart, and he refused, whereupon the defendants, as the servants of J. E. and S. B., gently laid hands &c.; and because the plaintiff resisted, the defendants, as the servants of J. E. and S. B., and by their command &c., a little hurt &c. the plaintiff. *Piggott* v. *Kemp*, 1 Cromp. & Meeson, 197.

END OF EASTER TERM.

Regula Generalis.

1832.
M. T. 2 W. IV.

EXCHEQUER CHAMBER.

IT IS ORDERED, That henceforth the costs of proceedings upon writs of error from the Court of Exchequer to this Court be taxed and allowed by the Master of the Court of Exchequer.

TENTERDEN.	J. B. BOSANQUET.
N. C. TINDAL.	W. E. TAUNTON.
S. GASELEE.	E. H. ALDERSON.
J. PARKE.	J. PATTESON.

MEMORANDUM.

IN Easter Vacation, David Pollock and John Blackburne, of the Middle Temple, Esquires, Philip Courtenay, of the Inner Temple, Esquire, and William Henry Maule, of Lincoln's Inn, Esquire, were appointed his Majesty's counsel learned in the law; and, on the first day of Trinity Term, took their seats within the bar accordingly.

In the Common Pleas.

TRINITY TERM, 3 WILL. IV.

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SWEET and Others *v.* ARCHBOLD.

THIS was an action brought in pursuance of an order of the Lord Chancellor, to try whether or not a certain work belonging to the plaintiffs had been pirated by the defendant.

The plaintiffs were the owners of the copyright of a work compiled by the defendant, intitled "The Practice of the Court of King's Bench." The defendant had previously contracted to prepare for S. (one of the plaintiffs), and one P., *an edition* of a work on the Practice of the Common Pleas; and, in pursuance of that contract, a small portion of this latter work was sent to the press by the defendant on account of S. and P., containing extracts from the King's Bench Practice, in some of the instances wherein the practice of the two Courts was the same. S. and P. being dissatisfied with the progress made by the defendant in the Common Pleas Practice, it was agreed between them that the latter should be released from his engagement, and should refund the purchase money which had already been paid him. The defendant accordingly gave S. and P. a cognovit for the amount, containing a clause that "nothing therein contained should extend to license or permit the defendant to publish or sell any copy or copies of the said intended work" until he should have fully paid the damages and costs therein mentioned. The defendant, in completing the Common Pleas Practice on his own account, embodied therein a large portion of the plaintiffs' work on the Practice of the Court of King's Bench. Upon a motion to dissolve an injunction that had been granted to restrain the sale of the Common Pleas Practice on the ground of piracy, the Lord Chancellor directed an action to be brought in this Court to try the question of piracy:—*Held*, that the above clause in the cognovit given in the action between S. and P. and the defendant, amounted to an implied consent *on the part of the plaintiffs* that the defendant should use their copyright of the King's Bench Practice.

The cause was tried at the Sittings for London after Trinity Term, 1831, when a verdict was taken for the plaintiffs, subject to the opinion of the Court upon the following case:—

'In September, 1826, the plaintiffs purchased of the defendant the copyright of his work, intitled "The Prac-

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tice of the Court of King's Bench, in Personal Actions and Ejectments," which was regularly assigned to them by deed, and of which they have been ever since, and still are, the owners. By an agreement which had been previously entered into between the plaintiff Sweet and one Pheney of the one part, and the defendant of the other part, it was agreed, upon the terms therein mentioned, that Sweet and Pheney should publish a manuscript of the defendant of an intended work on the Practice of the Court of Common Pleas, in one volume. A considerable delay having taken place on the part of the defendant in preparing the edition of the Common Pleas Practice for the press, the following correspondence took place between the plaintiffs' attorney and the defendant upon the subject:—

"14th May, 1827.

"Sir—Messrs. Pheney and Sweet have put into my hands your agreement with them for the sale of the second edition of your King's Bench Practice, and the first edition of an intended Common Pleas Practice; the consideration money, 400*l.*, I am informed, has been fully paid to you a long time ago; but only that part of the agreement relating to the King's Bench Practice has yet been performed. They have instructed me to proceed against you for the loss they have sustained by the non-fulfilment of such agreement; but, as I should be sorry to proceed without giving you an opportunity of coming to some arrangement, by which an action might be avoided, I beg to know whether you are willing to pay them such loss without an action, or to deliver them the Common Pleas Practice ready for the press, with an engagement to get it through immediately. Your's, &c.

"Rob. Nicol."

'To which the defendant sent the following reply:—

"16th May, 1827.

"Sir—In answer to your letter, I beg to say I am quite

ready to go to press with the Common Pleas Practice, and have been ready this some time; but, as you told me that a book written according to the present agreement, namely, a single volume, shewing the difference between the practice of the Common Pleas and King's Bench, would not be so desirable as a work in two volumes, treating of the Common Pleas Practice independently of that of the King's Bench, I deferred preparing the manuscript for the press until your clients had made up their minds upon the subject. If they wish the latter, they must pay me for the additional volume; and I shall require security for the due payment of it, for reasons that it is not necessary for me here to mention. I beg to say again, that I am ready to go to press with this work as soon as your clients choose. I am not acquainted with the terms of the agreement you allude to; nor can I say at this moment whether the bills given by Messrs. Sweet and Pheney on that account are paid or not. I am, Sir, your obedient servant,

"J. F. Archbold."

'The following reply was sent by the plaintiffs' attorney to the defendant on the 18th May, 1827:—

"Sir—I have been favoured with your's of the 16th, and have laid it before my clients. They expressed themselves rather surprised at some of the statements contained in it; but, waiving the discussion of the truth of those statements, they instruct me to say that they are quite willing to go to press instantly with your Practice of the Common Pleas, either in one or in two volumes, provided such Practice be, according to your agreement with them, a complete Practice of the Court, and not a mere exhibition of the difference between the Practice of the Common Pleas and the King's Bench, as mentioned in your letter. Should such Common Pleas Practice extend to two volumes, containing as much matter as the two volumes of

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the King's Bench Practice, they are willing, as I mentioned in conversation with you a long time ago, to remunerate you for the same after the same rate as for the King's Bench Practice. But, I beg you to understand that this offer is made on the supposition that such work is now ready for the press, or can be made so in a few days; for, they do not intend to enter into any fresh agreement upon the subject of what is already sufficiently defined in the subsisting agreement. As for the security you talk of requiring, and also your reasons for requiring it, which you do not mention, I can only reply that you have already the very best security, namely, my clients' money in your pocket for the last three years. Waiting your reply, I am, &c.

"Rob. Nicol."

'The plaintiffs, accordingly, employed Mr. M'Dowall, a printer, to print the work; and the printing of it commenced in the latter end of May, or the beginning of June, 1827, and was continued until the latter end of July following, at which time seventy-six pages were printed from manuscript furnished by the defendant; after which no further supply of manuscript took place.

'At the beginning of 1828, an action was commenced by Messrs. Sweet and Pheney against the defendant, for a breach of the said agreement in not having furnished manuscript of the said work of the Common Pleas Practice, within a reasonable time. That action was afterwards settled upon the terms contained in the following cognovit, given by the defendant:

"In the King's Bench.

"Between Richard Pheney and Stephen Sweet, Plaintiffs, and John Frederick Archbold, Esquire, Defendant.

"I, the above-named defendant, do confess this action; and that plaintiffs have sustained damage to the amount of 1000*l.*, besides their costs and charges, which have been

settled and agreed at the sum of 37*l.* 14*s.* 8*d.* But no judgment shall be entered up or execution issued, unless in default of payment of the sum of 194*l.*, the real damages as agreed between the parties, and the sum of 37*l.* 14*s.* 8*d.*, the amount of the said costs, on the 10th day of November next, when, if default be made, the plaintiffs shall be at liberty to enter up their judgment, issue execution, and levy the said damages and costs, together with the expense of entering up such judgment and issuing execution, sheriff's poundage, and other incidental expenses; and I consent to withdraw and relinquish my plea pleaded in this cause; and I undertake not to bring any writ of error, or file any bill in equity against the plaintiffs, or either of them, respecting the matter in dispute in this cause. And it is agreed that nothing herein contained shall extend to license or permit me, the said defendant, to publish or sell any copy or copies of the said intended work mentioned in the declaration in this cause upon the practice of the Court of Common Pleas, until after I shall have fully paid and discharged the abovementioned damages and costs; and it is further agreed, that, immediately upon payment by me of the sums aforesaid, all such parts of the said work as have been prepared or printed, and now in the possession of the plaintiffs, or their printer, or other person for them, shall be delivered up to me. As witness my hand, this 9th day of July, 1828.

"John Frederick Archbold (*a*)."

"Witness, Charles Dunn, clerk to Mr. Leigh,
"16, George Street, Mansion House."

'The defendant paid the damages and costs on the 5th November following, and shortly after received from Mr. M'Dowall, the printer, under an order for that purpose, all

(*a*) For the purpose of this action, it was admitted that this cognovit was also executed by the plaintiff Sweet, and by Pheney.

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the sheets which had been printed by him of the Practice of the Court of Common Pleas. The defendant thereupon employed the same printer, M'Dowall, to complete the printing of the work on his the defendant's account; and it is for this printing of the work that the plaintiffs filed their bill for an injunction, which was afterwards granted, and that the present action is brought by the direction of the Lord Chancellor. A copy of the Practice of the Court of King's Bench accompanies this case, for the inspection of the Court, being marked by the parties so as to shew to the Court the several parts which have been copied therefrom into the Practice of the Court of Common Pleas: in fact, it was admitted on the part of the defendant at the trial, that, where the practice was the same in both Courts, the latter work was a reprint from the former. And this copy being submitted to the judgment and inspection of the Court, renders it unnecessary to detail the evidence given as to the particular parts of the second work which constitute original matter, and the parts which are merely copied from the King's Bench Practice.

'On the part of the defendant it was proved by two witnesses, that the purchasing the Common Pleas Practice did not supersede the necessity of also purchasing the Practice of the King's Bench by professional men; but, as the books themselves are produced, the Court will be at liberty to form their own judgment and conclusion as to this point also.

'The Common Pleas Practice was published in two volumes, the first appearing in November, 1828, and the second in February, 1829; and previously to the publication of either volume, the plaintiffs subscribed for and received twenty-five copies of each; which copies, however, they returned to the defendant shortly after the issuing of the injunction against the sale.'

The question for the opinion of the Court was, 'whether the action, under the circumstances above stated, was main-

tainable. If the Court should be of opinion that it was maintainable, the verdict was to stand; if the Court should think it was not, then the verdict was to be entered for the defendant.'

The case now came on for argument.

Mr. Serjeant *Merewether*, for the plaintiffs, after reading the special case, submitted, that the present action was maintainable, it being founded on the statute 54 Geo. 3, c. 156, s. 4, which gives the author or proprietor of a book a right to sue any person printing or reprinting it without the consent of such author or publisher, by a special action on the case. Accordingly, the declaration in this case charges the defendant with having printed in his work, called "The Practice of the Court of Common Pleas," the plaintiffs' work, called "The Practice of the Court of King's Bench," without their consent; and in support of such charge, the plaintiffs produced copies of both works, by which it appeared that the one was merely a reprint of the other. [Lord Chief Justice *Tindal*.—Where the practice is the same in both Courts, how could the defendant have done otherwise?] He should have so stated it, and also pointed out where it differed, as he has done in the first seventy-six pages; but in the rest of the work he abandons that course, and merely reprints, particularly as to the separate treatise under the head of "Evidence," (Vol. 1, C.P., pp. 130—151). This is copied verbatim et literatim from the King's Bench Practice (Vol. 1, pp. 157—175). [Mr. Justice *Park*.—The practice relating to evidence must be the same in both Courts.] Undoubtedly, and the decisions upon which it is founded the same; but yet, although there have been several treatises on this subject by several excellent writers who are now alive, nevertheless they have adopted totally different arrangements of the subject-matter and classifications of the cases. Here the defendant reprints one book from the other; and, after he has absolutely sold his book on the

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Practice of the Court of King's Bench to the plaintiffs, he reprints it as a book on the Practice of the Court of Common Pleas, which he cannot be permitted to do without the consent of the plaintiffs. This cannot be assimilated to a case where two treatises on one subject are written by two different parties, containing generally the same matter, but differing in the mode; here the defendant is the author of both works, and the one is a reprint of the other. [Lord Chief Justice *Tindal.*—How are the plaintiffs damnified? All persons who want the Practice of the King's Bench must still purchase that book, although the practice might be nearly the same in both Courts. Mr. Justice *Bosanquet.*—The publication of these two works was not contemporaneous. If a man contracts to write an Italian and Spanish Grammar at the same time, with two different booksellers, he may introduce general rules applicable to both languages in each, and give to each of his publishers that which is common to both.] But here, whole titles are reprinted without the alteration of a single sentence; for instance, the headings "Jury Process," and "Plea puis darrein continuance," and many others. [Mr. Justice *Park.*—It seems to me that it must of necessity be so. The proceedings under the Lords' Act apply to both Courts, and the practice is the same in both.] If it were admitted that the incorporating part of an old work in a new one is not piracy, yet here the practice of the Common Pleas is a dry copy of the preceding work, with the exception of the first seventy-six pages, which are composed on a different plan, and contained fifty-three references to the Practice of the King's Bench. It never could have been intended or supposed by the plaintiffs that the defendant should reprint and publish at least five-sixths of the whole of the work he had previously sold to them, and had been paid for by them. And as to the subject-matter being in a great

(*a*) 1 East, 363, n.

part the same—in *Trusler* v. *Murray*, it was held that an action lay for a servile imitation of a work of Chronology, where, nevertheless, the facts and dates must necessarily have been the same. [Mr. Justice *Bosanquet*.—There the book was compiled and taken from another man's work.] Here it is precisely the same—this is an actual reprint of the plaintiffs' work, and it is a far stronger case than that; because, there it was held that one person could not borrow from another, but here it is the defendant himself who has sold his original work, and received the profits of his labour, who reprints the work he sold, to the prejudice of his own vendees. The plaintiffs, when they had paid their money for the King's Bench Practice, had a right to believe that they were to have the exclusive benefit of that purchase, and that they alone were to be entitled to the copyright of it, and that it was not afterwards to be re-printed and published in another work. [Mr. Justice *Gaselee*.—It appears that the plaintiffs were not willing that the practice of both Courts should be published in three volumes as at first agreed on, so as to give the public the benefit of it.] That was not the act of the plaintiffs, but of Sweet and Pheney, with reference to another contract. The defendant says in his letter, and in his preface to the Practice of the Common Pleas states, that "when he first compiled his MS., those parts where the Practice of the Courts of Common Pleas and King's Bench was the same were stated succinctly and generally, and references made to the MS. on the Practice of the Court of King's Bench; in those parts where the practice of the Courts differed, the practice of the Common Pleas was stated particularly" (as is the case in the first seventy-six pages); but that "he had been controlled in his intentions in this respect by the advice of persons who were very competent judges of the subject, and that they had persuaded him, and that he entirely agreed with them in opinion, that it would be extremely inconvenient to gentlemen consulting

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a book of this description for the practice of the Common Pleas, to be constantly referred to another and *distinct work* of his on the practice of the Court of King's Bench, and that it would have the effect at least of diminishing, if not altogether of destroying, one of the peculiar advantages of the work—its portability." This expressly points out the injury the plaintiffs sustain by the Practice of the Common Pleas being substituted for that of the King's Bench, instead of referring to it as in the seventy-six first pages. The plaintiffs had a right to suppose that the works would be distinct, and that the Common Pleas Practice would refer to the King's Bench, and not that the one would be a mere reprint of the other, and a substitute for it, or for any part of it. But it will be said that the cognovit and order to the printer, as set out in the case, operate or amount to a consent in writing, within the meaning of the statute 54 Geo. 3, to the defendant's publishing the Practice of the Common Pleas. But the correspondence between the parties is not the correspondence of the present plaintiffs; and the cognovit is in another action altogether distinct and separate from this, and arises out of another contract between other parties. The agreement for the publication of the Practice of the Common Pleas was entered into between Messrs. Sweet and Pheney of the one part, and the defendant of the other; and the cognovit was given with reference to that agreement alone, and to settle the action which arose out of that contract. The letters to the defendant were written by the attorney of Messrs. Sweet and Pheney, and not of Sweet and Messrs. Stevens, and did not refer in any manner whatever, directly or indirectly, to the subject-matter of the present action, in which the plaintiffs, who were no parties to the agreement for the publication of the Common Pleas Practice (with the exception of Sweet only), seek to recover damages for pirating their work on the Practice of the Court of King's Bench, which the defendant sold to the plaintiffs, and

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which he ought not to disparage by reprinting parts of it in another work for his own benefit. The cognovit must be considered as res inter alios acta, and cannot be taken advantage of by the defendant on the present occasion, or put forward as a ground of defence to this action. [Lord Chief Justice *Tindal.*—By the cognovit, the plaintiff Sweet consents, that, on payment by the defendant of the sums mentioned in the cognovit, the parts of the work on the Practice of the Common Pleas which had been prepared or printed should be delivered up to the defendant; and cannot one of several plaintiffs release a right of action? and how can the plaintiff Sweet now complain of his own act?] The cognovit had reference to a totally distinct matter, and to a different agreement, to which the present plaintiffs were no parties; and although it might so operate as to affect the plaintiff Sweet as to the Common Pleas Practice, yet the other plaintiffs had nothing to do with it; and neither they nor Sweet ever contemplated that it could interfere with their copyright of the King's Bench Practice, which had been published long before. The plaintiffs, Messrs. Stevens, never consented to the publication of the Common Pleas Practice; and the defendant could not reprint their work on the Practice of the King's Bench without their consent. By the terms of the statute such consent must be in writing, and signed by *all* the consenting parties, namely, "the proprietor or proprietors." Nor can Sweet's accepting the cognovit in his action with Pheney against the defendant on the contract entered into with them, with any fairness or propriety be considered as a consent by him, as one of the plaintiffs in this action, to waive or interfere with any right he has in common with the other plaintiffs, arising out of their previous and separate contract. But, even if the cognovit can apply to this case, it can only have reference to the first seventy-six pages, which were to be delivered up, and the completion of the work on the same plan as those

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pages. In truth, it amounted to no more than an abandonment of the contract for the copyright of the Common Pleas Practice, on the return of the original consideration for it; and the original object of the parties to the contract was wholly abandoned. The consent given by Sweet can, at any rate, only be taken to apply to the mode in which the Practice of the Common Pleas was originally commenced, namely, by reference to the Practice of the Court of King's Bench. Again, it will be said that the plaintiffs have not sustained any injury or damage by the publication of the Practice of the Common Pleas; but the 54 Geo. 3 was passed for the purpose of protecting literary property; and if a party print or reprint a book without the consent of the author or proprietor, it is contrary to that statute; and he is thereby subjected to an action on the case: the statute of itself imports an injury to the author or original publisher; and, therefore, the mere doing the act is, under the statute, such an injury to the plaintiffs as will, if nothing more, at all events entitle the plaintiffs to nominal damages. In *Merest* v. *Harvey* (*a*), where the jury gave the plaintiff 500*l.* damages against the defendant for sporting on the plaintiff's lands, the Court refused to reduce them, although the plaintiff had sustained no pecuniary damage. However, in this case, there has been a clear and substantial infringement of the plaintiffs' property, for which they are entitled to real damages. [Lord Chief Justice *Tindal*.—The defendant was not bound to go on as he had begun, and make references to his Practice in the King's Bench after he had quarrelled with the plaintiffs, and the first seventy-six pages had been returned to him.] That is not the question; but, to what extent Sweet's supposed consent can, under any circumstances, be fairly considered to apply. At all events, the plaintiffs were surely entitled to have their book left

(*a*) 1 Marsh. 139; S. C. 5 Taunt. 442.

entire; and the defendant could not copy any part, or reprint whole heads or chapters in the Common Pleas' Practice. The treatise on Evidence is not referable to the practice of either Court, and it had been previously sold to the plaintiffs, and published by them. The heads, "Feigned Issue," "Damages," and "Warrant of Attorney," were copied almost verbatim from the King's Bench Practice. This shews, therefore, that the Common Pleas Practice was simply, and in substance, as published, a reprint of the King's Bench. Although different writers may abstract the same cases, yet they will differ as to the mode of arrangement and collocation; but, here, the whole arrangement and collocation of every part of the chapter on "Evidence" is pirated, and reprinted verbatim; and this the defendant had sold to the plaintiffs, and he had no right to republish it, as he did, without one additional quotation or extract, or even a reference to any decision that had taken place since the publication of the Practice of the King's Bench. The word 'until' in the cognovit should fairly be taken as intended only to restrain the defendant from publishing his Common Pleas Practice till he had paid the money agreed on. At all events, if he sought to avail himself of this covenant, he was bound to publish the Practice as he had begun it, and so as not to interfere with the plaintiffs' copyright or property in the Practice of the Court of King's Bench. If the case of *Cary* v. *Kearsley* (*a*) should be relied on for the defendant, it should be remembered that the principle there adopted was afterwards qualified in *Roworth* v. *Wilkes* (*b*). In the one hundred and eighty-first page of the second volume of the Common Pleas Practice, which treats of the removal of causes from inferior Courts, it is said, that, under the writ of habeas corpus cum causa, the prisoner is committed to the custody of the *Marshal*, instead of stating

(*a*) 4 Esp. Rep. 168. (*b*) 1 Camp. 94.

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the committal to be, according to the former practice of the Common Pleas, to the Warden of the Fleet; which is a decisive instance to shew the servile and erroneous transcription from the King's Bench Practice. And it is impossible for any one to look at the two books without being satisfied that the Common Pleas was actually printed from the printed leaves of the plaintiffs' King's Bench Practice—a clear and positive piracy. [Lord Chief Justice *Tindal.*—The difficulty thrown on the defendant appears to me to be, that the head of "Evidence," and several others, which are not strictly the subject-matter of practice, are copied or reprinted from the Practice of the King's Bench.]

Mr. Serjeant *Jones*, for the defendant.—The publication of the book intitled, "The Practice of the Common Pleas," by the defendant, is no invasion of the plaintiffs' property in their work on the Practice of the King's Bench, even although the defendant might have been a perfect stranger to that work. It is not necessary to inquire into the law relating to literary property before or since the passing of the statute of Anne, as it is now regulated and modified by the 54 Geo. 3, and on which the question in this case solely depends. The only possible injury the plaintiffs can have sustained by the publication of the Common Pleas Practice is by a diminution of the sale of the King's Bench Practice, of which they offered no evidence at the trial. The property in that book still remains in them. The defendant, in publishing the practice of this Court, was not bound to confine himself to mere dry points or decisions on practice by this Court alone; for, the practice of both Courts is similar in several respects; and, although it may vary in some points, yet the only question is, whether the publication of the Common Pleas Practice has affected the plaintiffs' rights as the proprietors of the Practice of the Court of King's Bench; or, in other words, whether the

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one can be substituted for the other. They are distinct and separate works. The book purchased by the plaintiffs treats of the practice of the Court of King's Bench as such; and the book published by the defendant professes to relate to the practice of this Court; and the purchase of the latter does not supersede the necessity of also purchasing the former; and this was expressly proved at the trial. If a person publish a medical book on the subject of gout, or any particular complaint, and another writes a general essay on the treatment of diseases, or application of medicines, and he publishes the prescription for the cure of gout, as being applicable to the cure of another complaint —for instance, rheumatism; can it be contended for a moment that he would not be justified in so doing? Any injury the plaintiffs may be supposed to have sustained is not to be left to mere illustration or fancy. The question is, has their property in the King's Bench Practice been deteriorated, and to what extent; and they have not only failed to shew any invasion of their copyright or property by the defendant, but the negative has been expressly proved—namely, that the purchase of one work does not supersede the necessity for purchasing the other also. In *Roworth* v. *Wilkes* (*a*), Lord Ellenborough said—"This action is brought for prejudice to a work vested in the plaintiffs; and the question is, whether the defendant's publication would serve as a substitute for it." That is the true test, and the damage the plaintiffs have actually sustained is the substantive cause of action; and it was incumbent on them to shew affirmatively that the Practice of the Common Pleas may be used as a substitute for the Practice of the Court of King's Bench. Although the same rules may apply to both Courts, the practitioner certainly would not consult the book treating of the practice of this Court to find the mode of practice

(*a*) 1 Camp. 98.

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adopted and used by the Court of King's Bench; and the defendant has given the practice of each Court in distinct and different treatises. In *Cary* v. *Kearsley* (*a*), it was held that it is not sufficient to support an action for pirating a book, that part is found transcribed into another; for that it is lawful to use former publications in composing a new work, if they are fairly taken without being made colour for publishing the original work. And here the two works do not treat of the same subject-matter; neither were they published for one and the same purpose, nor can the one be used as a substitute for the other; and it cannot be said that the defendant was bound to re-write the whole of that part of the Practice of the Court of the King's Bench which was applicable to and conformable with the practice of this Court. As to the chapter relating to "Evidence," it does not profess to be a treatise on the principles of that branch of the law, as arranged and digested by Peake, Phillipps, Starkie, and other text writers; but merely as regarding the practice with respect to evidence, namely, as to the technical mode of getting it up, and the formal way of adducing the necessary proofs, or the manner of bringing them before the Court, or a Judge at Nisi Prius. The practical course to be adopted with regard to evidence is part of the machinery of the Court, and the mere technical mode of proof is wholly independent of the principles on which the general law relating to evidence is founded. [Lord Chief Justice *Tindal*.—A great deal appears to me to relate to the general law of evidence: for instance, there are nearly three pages as to the mode of proof of the hand-writing of parties to deeds, or attesting or subscribing witnesses.] In Vol. 1. p. 145, C. P., under the head "Penalty for not obeying the Subpœna"—a reference is made at the conclusion of the second sentence, to 3 Bing. 233, whilst at the end of the corres-

(*a*) 4 Esp. Rep. 168.

ponding sentence in the Practice of the King's Bench, Vol. 1, p. 173, the only reference is to Tidd, 723. So, as to the "Witnesses' Expenses," Vol. 1, King's Bench, p. 172—Common Pleas, p. 146, the references in the former work are chiefly made to decisions in this Court, by which it appears that the practice in this respect was first established. But, even assuming that the publication by the defendant of the practice of this Court might be an invasion of the plaintiffs' rights with regard to the Practice of the King's Bench, yet the plaintiff Sweet, with full knowledge of this fact, accepted a cognovit from the defendant, and actually received the sums he thereby stipulated to pay for the breach of the agreement in not furnishing the manuscript of the Common Pleas Practice; and the defendant was only to be restrained from publishing that work until he had paid and discharged the damages and costs agreed to be due and payable to Sweet and Pheney. This may be assimilated to a case where a party grants to another a leave or licence to enter on his land, upon payment of a trifling sum as an acknowledgment; and, upon payment of that sum, there can be no doubt but that the party has an immediate right to enter. Thus, seventy-six pages of the Common Pleas Practice were published before the cognovit was given, and which contained the scheme or mode in which that work was to be prosecuted; and the mere difference or the resemblance of the practice in each of the Courts is matter of accident; and it appears that previously to the publication of either volume of the Common Pleas Practice the plaintiffs subscribed for and received twenty-five copies of each, which they did not return until after the issuing of the injunction against the sale. After the seventy-six pages were returned to the defendant, he was not bound to refer to his former work, or puff off his book on the Practice of the King's Bench; and, as he wholly discontinued making any reference to it, the plaintiffs could have sustained no injury in the sale of that work.

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[Lord Chief Justice *Tindal*.—It is clear that the references to the King's Bench Practice in the first seventy-six pages were for the benefit of the plaintiffs, as it would tend to increase the sale of that book. Mr. Justice *Park*.—But, when the defendant was no longer writing for them, but publishing on his own account, he discontinued making references to the plaintiffs' book.] That he had a clear right to do, as he considered that the Practice of this Court was to be wholly distinct and separate from that of the Court of King's Bench. Although the statute requires the consent of the author or *authors*, proprietor or *proprietors*, to be in writing, yet a signature by one is equivalent to a signature by all, as in the case of a release; and here, the plaintiff Sweet was a party to the cognovit; and it must be assumed that Messrs. Stevens the co-plaintiffs were aware of the terms of that instrument, and that the defendant had leave and authority to publish the Common Pleas Practice on paying a certain sum within a limited time, and with which he complied. The cases of *Beckett* v. *Donaldson* (*a*) and *Miller* v. *Taylor* (*b*) do not apply, as the question here is not on the plaintiffs' right or remedy at common law, or under the statute of Anne, nor whether their own work can be considered as a substitute for the other. It was never intended so to be; and consequently there has been no invasion of the plaintiffs' property or copyright in the work treating of the practice of the Court of King's Bench.

Mr. Serjeant *Merewether*, in reply.—It is beyond doubt that the defendant published his work on the practice of this Court, in part substitution of his book on the practice of the King's Bench; and although it has been said that the plaintiffs have sustained no actual damage or injury, as the one work was not a complete substitution for the other, yet, if there be a substitution as to part, it amounts

(*a*) 2 Brown's Parliamentary Cases, 145. (*b*) 4 Burr. 2408.

to piracy, particularly where the part substituted is a literal copy or reprint of the former publication. The chapter on Evidence is so reprinted, and that is not peculiar to either Court, but equally applicable to both. Several other heads also are altogether distinct from the practice, for instance, Arbitration, and the like, and they have been reprinted by the defendant, although they formed substantive parts of the King's Bench Practice. [Lord Chief Justice *Tindal*.—The purchaser of an Encyclopædia would not buy a treatise previously published which is embodied in the work purchased by him, although, if the editor of the Encyclopædia copy the whole of the treatise, and insert it without comment in his work, it might amount to piracy pro tanto. Mr. Justice *Bosanquet*.—The question here is, whether there has been a substitution by the defendant in this case, so as to work an injury to the sale of the original work which he disposed of to the plaintiffs.] The copying of a single passage might, in some instances, amount to piracy, as in the case of the result of arithmetical calculation, or the solution of a difficult mathematical problem; but, if a passage be copied for the purpose of being criticised, or reviewed, it is not piracy. A person may print Gray's works, but if he publish them together with the original poems first edited by Mason, it amounts to piracy, although he might have been justified in publishing Gray's former works alone. In this case there are several chapters or essays independent of the practice of the Court, which were published in the defendant's book on the Practice of the King's Bench, and which were the property of the plaintiffs, having been bought by them of the defendant. These essays were re-published in the Common Pleas Practice, after which a person need not purchase the King's Bench Practice to obtain those chapters, which were the exclusive property of the plaintiffs. That, therefore, was a direct infringement of their rights, and is sufficient to shew that the plaintiffs sustained a di-

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rect injury by the publication of the Common Pleas Practice. [Mr. Justice *Bosanquet*.—Crompton's Practice is frequently purchased by professional men for the introduction alone. Lord Chief Justice *Tindal*.—The question is, whether the defendant published his Common Pleas Practice animo furandi. The property in these books cannot now be so valuable, as the practice of the two Courts has been so much assimilated by the late rules.] The plaintiffs would not have interfered with the publication or sale of the Common Pleas Practice, if it had not been a mere reprint of their own book, which they had bought of the defendant; and although it has been said that the consent of one of the plaintiffs for the defendant to publish his Common Pleas Practice is equivalent to a consent by all; yet the words of the act are in the disjunctive, namely, proprietor *or proprietors*. The assent by all the plaintiffs was consequently required by the statute; and such consent, to be effectual, should have been in writing, and signed by all. As to the plaintiffs' remedy at common law, or under the statute of Anne, it has nothing to do with the present question, which depends entirely on the construction of the 54 Geo. 3. It is, therefore, unnecessary to consider the decisions of *Beckford* v. *Rood* (*a*), or *Murray* v. *Elliston* (*b*); for, the sole point for the consideration of the Court is, whether the defendant has or has not substantively pirated the plaintiffs' book, in the whole or in part; and, on the examination of the two works, and comparing the one with the other, it will be found that at least five-sixths of the book on the practice of this Court is an exact copy or reprint of the book on the practice of the King's Bench, including the separate treatises on Evidence, Arbitration, and the like. And, as to the supposed consent, if it applies in any respect to the present plaintiffs, it can only apply to the continuing the rest of the work in the same

(*a*) 7 Term Rep. 620. (*b*) 5 Barn. & Ald. 657.

manner as the first seventy-six pages were begun; and there is no pretence whatever for saying that there was any consent, express or implied, to the reprint of the treatises on Evidence, Arbitration, &c.

Cur. adv. vult.

Lord Chief Justice TINDAL.—Two questions have been made in this case—first, whether the matter copied from the work on the practice of the Court of King's Bench into the work on the practice of the Court of Common Pleas is of such a nature and extent as to entitle the plaintiffs, who are the proprietors of the former work, to maintain an action for a violation of their copyright, supposing nothing to have occurred by which any authority has been given to the defendant to interfere with such right—and, secondly, whether the publication by the defendant of the Practice of the Common Pleas, in the form in which he has published it, has been so far authorized by one of the plaintiffs as to deprive him of the right to complain of such publication in a joint action with his co-proprietors, and thereby to have the effect of defeating this action. If this second question must be decided in favour of the defendant, it will be unnecessary to discuss the first; and we are of opinion that it must be so decided. The defendant having sold to the plaintiffs his copyright in a work upon the practice of the King's Bench, written by himself, contracted with Sweet, one of the plaintiffs, and a person named Pheney, to write for them a work upon the practice of the Common Pleas; and having failed to perform that contract, an action was commenced against him by Sweet and Pheney to recover damages for that breach of his engagement, which action was afterwards settled upon terms: those terms are stated in a cognovit given by the defendant to Sweet and Pheney, which is admitted, pursuant to the order of the Lord Chancellor, to have been signed by Sweet and Pheney as well as by the defen-

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dant, though it is not so stated in the case; the substance of those terms was, that the defendant should pay Sweet and Pheney a sum of 194*l.* by way of damages for having neglected to supply manuscript for the intended work, together with 37*l.* 14*s.* 8*d.* for costs of suit; and that, upon payment of such damages and costs, *the defendant should be at liberty to publish the work himself.* The defendant having paid such damages and costs, published, upon his own account, the work which is now alleged to be an invasion of the plaintiffs' copyright of the King's Bench Practice. It becomes necessary, therefore, to inquire what was the nature of the intended work which was the subject of the action settled upon the above terms; for, it is the work intended by the parties to that action which the defendant was authorized to publish upon payment of the damages and costs To ascertain the nature of that intended work, we must recur to the correspondence, by which it appears that the work originally contemplated by both parties was to be comprised in a single volume, shewing the difference only between the practice of the King's Bench and that of the Common Pleas; but that, afterwards, the character of the work was varied by mutual consent, and it was agreed that it might be extended to two volumes. It was particularly insisted upon for Sweet and Pheney, that it should be a complete Practice of the Court, and not a mere exhibition of the difference between the practice of the Common Pleas and King's Bench; and it was stated, that, if such work on the Common Pleas Practice should extend to two volumes, and contain as much matter as the two volumes of the King's Bench Practice, they, Sweet and Pheney, were willing to pay for it after the same rate as had been paid for the Practice of the King's Bench. This work upon the King's Bench Practice contained a great variety of matter not peculiarly applicable to the Court of King's Bench, but embraced many subjects which appeared to the author to be

useful to the practitioner in the Court of King's Bench, though equally applicable to the other Courts at Westminster-Hall; such, among others, as a section of several pages upon Evidence: and it must have been quite obvious to any one, that a work upon the practice of the Common Pleas, however complete, could not furnish matter for two such volumes as those relating to the practice of the King's Bench, unless it comprised, like those volumes, such matters, as, being common to all the Courts, were necessary for the information of the practitioner in the Common Pleas. Accordingly, the defendant proceeded to furnish to Sweet and Pheney manuscript for a work composed upon the model of the King's Bench Practice, and embodying in it *all such parts of the work upon the practice of the King's Bench* as were found equally applicable to the practice of the Common Pleas. Seventy-six pages, written upon that model, were supplied by the defendant to Sweet and Pheney, and by them sent to their printer, and actually printed. But, the defendant having neglected to proceed in furnishing the manuscript, Sweet and Pheney brought the action already mentioned. Now, it is observable, that, of the seventy-six pages so supplied, not less than twenty-five or twenty-six pages consist of extracts copied verbatim from the King's Bench Practice; it was therefore impossible for any person looking at the new work, not to see that it was an adaptation of the plan and materials of the work on the King's Bench Practice to that of the Common Pleas, so far as they were applicable to that Court. If the defendant had supplied manuscript for the remainder of the work in the form now published, can it be doubted that such manuscript would have answered the description of the work intended by Sweet and Pheney, as well as by the defendant, for not completing which the action was brought by the former against the latter? Looking at the alteration made in the plan of the work originally proposed, the execution of a consider-

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able part of it upon the altered plan without objection by Sweet and Pheney, and the prosecution of an action against the defendant for not proceeding with the work commenced upon that plan, we think that the work now published is fairly to be considered as the intended work which was the subject of the action; and, consequently, that the defendant, having paid the stipulated damages and costs for not completing that work, is not liable to an action at the suit of Sweet and his co-plaintiffs for having published such work upon his own account. We therefore think the verdict should be entered for the defendant.

Judgment for the defendant.

CHRISTOPHER H. T. HAWKINS, an Infant, by J. H. HAWKINS, his next Friend, *v.* JOHN HAWKINS and MARY ANN HAWKINS.

By a deed of settlement made in 1756, lands were settled by T. H. in tail male to the use of such person as at the time of the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the use of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son, for the time being, of T. H. and A. H., who should by the death of such second, third, fourth, or other son, without issue, become a second son; and, for default of such issue as aforesaid, and in case there should be two or more daughters of T. H. and A. H., then to the use of such daughters and their heirs as tenants in common; but, in case there should be only one son of T. H. and A. H., then to the use of the eldest or only son: and for default of all such issue, to the use of T. H. in fee. T. H., the settlor, died in 1766, leaving four sons—P., who died in 1770, an infant, and without issue—C., who died in 1829, without issue—T., who died in 1783, without issue—and John, who survived:—*Held*, that, under the circumstances, John, the fourth son of the settlor, took an estate in tail general in the settled estates.

BY an order made by his Honour, the Vice-Chancellor, in this cause, on the 9th May, 1832, the following case was directed to be stated for the opinion of this Court:—

By indentures of lease and release and settlement, bearing date respectively the 16th and 17th June, 1756, the indenture of release and settlement being of four parts, and being made and executed by and between Christopher Hawkins of Trewinnard in the county of Cornwall, of the first part, Thomas Hawkins of Trewithen,

in the same county (the only son of the said Christopher Hawkins), of the second part, James Heywood and Ann Heywood, spinster (the eldest daughter of the said James Heywood), of the third part, Sir R. Vyvyan, Bart., Sir John St. Aubyn, Bart., Henry Sperling, and James Sperling, of the fourth part—reciting, that, by the will of Philip Hawkins, then late of Trewithen aforesaid, deceased, late uncle of the said Thomas Hawkins, he, Thomas Hawkins, was seised for the term of his life of and in divers freehold manors and hereditaments in the county of Cornwall, subject to the several rent-charges and incumbrances in the said will mentioned, with remainder to his first and other sons severally and successively in tail male, with divers remainders over: by means whereof an ample provision was made and secured, after the decease of Thomas Hawkins, for the eldest son of his body to be begotten—and reciting that a marriage was then intended shortly to be had and solemnized between the said Thomas Hawkins and Ann Heywood; and that the said James Heywood agreed to give and pay the sum of 8,000*l.* as the marriage portion and by way of advancement of his said daughter; and that the said Christopher Hawkins, in consideration thereof, did agree to give and pay the sum of 5,000*l.* for the advancement of the said Thomas Hawkins, and as a better provision for the said Ann, his intended wife; and, as a further provision for the said Thomas Hawkins and Ann Heywood, in case the said intended marriage should take effect, and she should happen to survive her said intended husband, and for the issue of the said intended marriage (if any such there should be), he, the said Christopher Hawkins had agreed and undertaken to settle, convey, and surrender, in manner thereinafter mentioned, several lands, tenements, and hereditaments in the said county of Cornwall, being freehold, copyhold, and parcel of the antient Duchy Manor of Helston, in the said county of Cornwall, of the yearly

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value of 500*l.*, to the uses and upon the trust thereinafter also mentioned and expressed—It was by the said indenture (amongst other things) witnessed, that, in consideration of the said intended marriage, and for making a further provision for the said Thomas Hawkins, and also for the said Ann Heywood in case the said marriage should take effect and she should survive the said Thomas Hawkins, and of the child or children to be born of the said marriage as thereinafter was mentioned; and, in further pursuance of the agreement of the said Christopher Hawkins thereinbefore recited, and for the nominal consideration therein mentioned, he the said Christopher Hawkins did grant, bargain, sell, release, and confirm unto the said Sir John St. Aubyn and Henry Sperling, and their heirs (amongst other hereditaments), all that the capital messuage, barton, and dwelling-house, with the appurtenances thereto belonging, called by the several name or names of Alwarne, otherwise Alwerton, otherwise Alwarnton, otherwise Alwarton, and Chycourkey, situate within the parish of Maddern, and town of Penzance, in the county of Cornwall, together with the grist mill thereto belonging called Chycourkey mill, and all and every and singular, those several and respective fields, meadows, closes, inclosures, and parcels of land therein and hereinafter mentioned, that is to say, &c., &c.; and also all that one third part of the manor or lordship of Trewinnard, and one third part of the barton of Trewinnard, and of two water grist mills thereunto belonging; and also one-third part of all that messuage or tenement called Trelcan; and also one-third part of two several messuages or tenements called Tremelling and Tregoose; all which said premises were situate in the parish of St. Erth, in the county of Cornwall aforesaid; together with one-third part of all other the messuages, tenements, lands, hereditaments, and premises, being part or parcel, or reputed to be part or parcel of the said manor of Trewinnard, lying

and being in the several parishes of Ludgeon and Uny Le Lant, in the said county of Cornwall, with the rights, members, and appurtenances thereunto belonging: and also all that messuage or tenement, with all and singular its appurtenances, commonly called or known by the name of Colrogger, situate, lying, and being in the parish of Mullion, in the said county of Cornwall, then in the tenure or occupation of William Tomkin, with their appurtenances—To hold the same premises to the said Sir John St. Aubyn and Henry Sperling, their heirs and assigns, upon the several trusts, and to and for the several uses and purposes thereinafter and hereinafter limited, expressed, and declared of and concerning the same, that is to say, to the use and behoof of the said Christopher Hawkins and his heirs until the solemnization of the said intended marriage, and, from and after the solemnization thereof, then to the use of the said Christopher Hawkins and his assigns during his natural life, without impeachment of waste; and, from and immediately after the determination of that estate, to the use of the said Sir John St. Aubyn and Henry Sperling, and their heirs, during the life of the said Christopher Hawkins, upon trust to support the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries as occasion should be or require; but nevertheless to permit and suffer the said Christopher Hawkins and his assigns during his life to receive and take the rents and profits thereof and of every part thereof for his and their own use and benefit: and, from and after the decease of the said Christopher Hawkins, in case Mary Hawkins his then wife should survive him, to the use and behoof of her the said Mary Hawkins and her assigns for and during the term of her natural life; and, from and after the determination of that estate, to the use of the said Sir John St.

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Aubyn and Henry Sperling, and their heirs, during the life of the said Mary Hawkins; upon trust to support and preserve the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries from time to time as occasion should require, but nevertheless to permit and suffer the said Mary Hawkins and her assigns during her life to receive and take the rents and profits thereof to and for her and their own use and benefit; and, from and immediately after the decease of the said Mary Hawkins, in case the said Thomas Hawkins should survive her, to the use of the said Thomas Hawkins and his assigns for and during the term of his natural life, without impeachment of waste; and, from and immediately after the determination of that estate, to the use of the said Sir John St. Aubyn and Henry Sperling, and their heirs, during the natural life of the said Thomas Hawkins, upon trust to preserve and support the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries from time to time as occasion should require, but nevertheless to permit and suffer the said Thomas Hawkins and his assigns to receive and take the rents and profits thereof to and for his and their own use and benefit; and, from and immediately after the decease of the said Thomas Hawkins, in case the said Ann Heywood should happen to survive the said Thomas Hawkins, her intended husband, to the use, intent, and purpose that the said Ann Heywood should and might yearly and every year for and during the term of her natural life have, receive, and take from and out of the said messuages, lands, tenements, and hereditaments, and from and out of the monies to be raised by fines by making and granting leases pursuant to the proviso or liberty thereafter contained, and from and out of the yearly and other rents, issues, and casual and other profits thereof,

one annuity or clear yearly rent-charge of 200*l.* of lawful money of Great Britain in lieu and bar of dower, with power of distress and entry for recovering the same when in arrear: And as to, for, and concerning all and singular the same messuages, lands, tenements, hereditaments, and premises so charged or chargeable with the said annual sum or rent-charge of 200*l.*, and such remedies for the same as therein mentioned, and, from and immediately after the decease of the said Thomas Hawkins, to the use and behoof of the said Sir R. Vyvyan and James Sperling, and their executors, administrators, and assigns, for and during and unto the full end of five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste; but, nevertheless, upon the several trusts and for the several intents and purposes, and under and subject to the several provisos, limitations, declarations, and agreements thereinafter mentioned, expressed, and declared of and concerning the same term, that is to say, In trust in the first place for the better securing to the said Ann Heywood and her assigns during her life the due payment of the said annual sum or yearly rent-charge of 200*l.*, and also the arrears thereof, in such manner as therein is mentioned; and upon further trust to permit such persons as would be entitled to the reversion or remainder expectant on the said term of five hundred years to receive the residue of the rents over and above what should be sufficient to satisfy the said annuity of 200*l.*, with a proviso for cesser of the said term after the decease of the said Ann Heywood and payment of all the arrears of the said annual sum or yearly rent-charge and all costs attending the same: And as to, for, and concerning all and every the messuages, lands, tenements, and hereditaments thereinbefore mentioned and described called Allwarne *alias* Alwerton *alias* Alwarnton *alias* Alwarton, and the grist mill thereto belonging, one third of the manor and barton

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of Trewinnard and the mills called Trewinnard mills, and also all that messuage or tenement called Colrogger, being of the yearly value of 200*l.* per annum and upwards, from and after the end or determination of the said term and estate of five hundred years, and subject thereto in the meantime, *To the use and behoof of such person as, at the time of the decease of the said Thomas Hawkins, should be the second son then living of the body of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten*, and of the heirs of the body of such second son lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, and all and every other son and sons (other than and except the eldest son for the time being) of the body of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, *who should*, by the death of such second, third, fourth, or other son, without issue of his or their respective body or bodies, *become a second son*, severally and successively and in remainder, one after another, as they and every of them should be in priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; and, for default of such issue as aforesaid, and in case there should be two or more daughters of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, then, to the use of all and every such daughters of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, and the heirs of their several and respective bodies lawfully issuing, to take as tenants in common, and not as joint tenants: but, in case there should be only one such daughter of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, then, To the use of the eldest or only son of the said Thomas Hawkins on the body of the said Ann Heywood, his intended wife, to be begotten, and the heirs of the body of such eldest or only son lawfully issuing; and, in default of all

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such issue, to the use of the said Thomas Hawkins, his heirs and assigns, for ever: And as to, for, and concerning the rest, residue, and remainder of all and every the several messuages, lands, tenements, and hereditaments thereinbefore granted and conveyed, subject to the several uses thereinbefore mentioned and declared thereof, and from and after the expiration or other sooner determination of the said term of five hundred years, to the use and behoof of the said Thomas Hawkins, his heirs and assigns for ever.

The said Thomas Hawkins died intestate in the year 1766, in the lifetime of his said father Christopher Hawkins. The said Christopher Hawkins departed this life in the year 1769, leaving his wife, the said Mary Hawkins, him surviving. The said Mary Hawkins departed this life in the year 1779. The said Ann Heywood, afterwards Ann Hawkins, had long since departed this life, and the said annuity of 200*l.* had long since been fully paid and satisfied. The marriage between Thomas Hawkins and Ann Heywood was duly had and solemnized shortly after the date of the said indentures of lease and release and settlement, and there was issue of the said marriage four sons, that is to say—Philip Hawkins, the eldest son, who survived his father, and died an infant and without issue in the year 1770—Christopher Hawkins, afterwards Sir Christopher Hawkins, who was at the time of the decease of the said Thomas Hawkins, his father, the second son of the said marriage, and died a bachelor on the 6th day of April, 1829—Thomas Hawkins, who was the third son, and was born in the year 1759, and died a bachelor on or about the 3rd of August, 1783—and John Hawkins, who was the fourth son of the said marriage, and is now living; and also one daughter only, Mary, who is the wife of Mr. Trelawney.

By indentures of lease and release bearing date respectively the 23rd and 24th days of May, 1780, the release

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being made and executed between the said Sir Christopher Hawkins, then Christopher Hawkins, Esq., and therein described to be the eldest surviving son and heir of the body of the said Thomas Hawkins deceased, of the first part, John Radcliffe, therein described, of the second part, and Robert Venables Hinde, therein described, of the third part—it was by the said indenture of release witnessed, that, for barring, docking, defeating, and extinguishing all estates tail, and all the reversions and remainders expectant thereon of and in the manors, messuages, tenements, farms, lands, and hereditaments, and parts of manors, messuages, tenements, &c., thereinafter mentioned to be thereby granted and released, and to the intent that the same several manors, messuages, lands, hereditaments, and premises might be settled, limited, and assured to the use of the said Christopher Hawkins and his heirs, and for the nominal consideration therein mentioned, he the said Christopher Hawkins did grant, bargain, sell, alien, release, and confirm unto the said John Radcliffe and to his heirs (amongst divers other manors and hereditaments) all that the manor or reputed manor of Treveneague and Pemberthy, with the appurtenances, and the capital messuage, barton, farm, and demesne lands called Treveneague, Treveneague Vean, and Frighton, and the messuages, lands, and tenements called Pemberthy Kestell, and the messuages, mills, stamping mills, lands, and tenements called Relobes, Relobes Vean, and Relobes mills, Trewhalla, Carbus *alias* Carbews, and Carbas *alias* Carbons mills; and also all those houses, gardens, lands, and premises in Market Jew *alias* Marhassion; and also all those messuages, cottages, lands, wastes, and commons called Nanguskes, Penhale, Manyn, and Knee Bone, and the messuage or tenement called Chenoweth *alias* Chaweth; and all those lands, wastes, and commons called St. Hillar *alias* St. Hillar Downes and Relobes Moor; and all those messuages, lands, and tenements called Trewidden Veor and Trewidden Vean, in the parish of Maddern: all which

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of the said manors, and all and singular other the manors, messuages, tenements, lands, and hereditaments whatsoever which were theretofore belonging to Philip Hawkins, deceased, and were by him given and devised to the use of the said Thomas Hawkins, the father of the said Christopher Hawkins, for his life, and, after his decease, to the use of the first and other sons in tail male; and all and singular other the manors, messuages, lands, tenements, and hereditaments, and parts of manors, &c., of him the said Christopher Hawkins lying and being in the several parishes, places, and precincts aforesaid, or either of them, in the said county of Cornwall—To hold unto and to the use of the said John Radcliffe and his heirs, to the intent that he might become tenant of the freehold of the said manors, hereditaments, and premises, in order that one or more common recovery or recoveries might be thereof suffered as therein mentioned, which should enure to the only proper use and behoof of the said Christopher Hawkins, his heirs and assigns for ever, and to and for no other use, intent, or purpose whatsoever.

In Trinity Term, 20 Geo. 3, a recovery was accordingly suffered, wherein the said Robert Venables Hinde was demandant and the said John Radcliffe was tenant, and the said Sir Christopher Hawkins (then Christopher Hawkins) was vouchee, of the said manor of Treveneague and divers other manors, messuages, tofts, mills, gardens, lands and premises in St. Hillary, Wadderne, Market Jew, St. Erth, and divers other parishes and places in the said county of Cornwall.

The said Sir Christopher Hawkins, on or about the 28th January, 1823, duly signed and published his last will and testament in writing, which was executed and attested in such manner as is by law required for passing freehold estates by devise; and by such will the said Sir Christopher Hawkins gave and devised all his manors and

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lordships, reputed manors and lordships, and all other the freehold messuages, lands, tenements, and hereditaments, and real estate (except certain estates in the borough and parish of St. Imes, and in the parish of St. Breock, his share in the company of Trevenen Carne and Wood, and the next presentations to the churches of St. Just, in Roseland, and St. Mewan, to his nephew, Christopher Henry Thomas Hawkins for his life, with remainders over.

The questions for the opinion of the Court were—

First—whether John Hawkins, the fourth son of Thomas Hawkins, the father of the said Sir Christopher Hawkins, did, under or by virtue of the said indentures of lease and release and settlement of the 16th and 17th of June, 1756, either in the lifetime or on the death of the said Sir Christopher Hawkins, and in the events which have happened, take any and what estate or interest, estates or interests, in the several messuages, lands, and hereditaments comprised in the said indentures of lease and release and settlement of the 16th and 17th days of June, 1756, or any and which of them.

Secondly—whether, having regard to the terms of the indentures of the 23rd and 24th days of May, 1780, being the deeds to make the tenant to the præcipe for, and to lead or declare the uses of the said recovery which was suffered by the said Sir Christopher Hawkins in Trinity Term, 20 Geo. 3, such recovery comprised any and which of the several messuages, lands, and hereditaments conveyed by the said indentures of lease and release and settlement of the 16th and 17th days of June, 1756, and thereby limited to the use and behoof of such persons as at the time of the decease of the said Thomas Hawkins should be the second son then living of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, and of the heirs of the body of such second son lawfully issuing.

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Mr. Serjeant *Taddy*, for the plaintiff.—Upon the death of the settlor, Thomas Hawkins, in the year 1766, the state of the family was this:—There were then living four sons, Philip, Christopher, Thomas, and John (the present defendant) and one daughter. The primary object of the settlement being to make provision for the second son, Christopher took possession; and upon his death the question arises. Before the death of Christopher, the first and third sons, Philip and Thomas, also died. At the death, therefore, of Christopher, John became not a second, but an only son. Upon the authorities the construction of this limitation is free from difficulty. The intent of the settlement was, first, to provide for the second son of the marriage, then for the daughters, and afterwards for the eldest or only son. The defendant cannot take as eldest or only son; for, at the decease of the settlor, Philip was the eldest son; and that estate, being once vested, could not afterwards divest. In *Shelley's* case (*a*), it is said: "If a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. dies having a daughter, his wife with child with a son, the daughter claims it by purchase, and therefore the son born after shall never divest it:" and the Year Book, 9 Hen. 7, 25 a. is cited, where it is laid down, "that, if a condition descends to the daughter, and she enters for the condition broken, the son born afterwards shall never enter upon her; and yet there she is in by descent, and the title of her entry, that is to say, the condition that she hath as heir: and yet, because she was the first in whom it vested, the son born after shall not divest it." In *Trafford* v. *Ashton* (*a*) it was held that a second son took an estate by that description, being second in order of birth, the elder son being dead before the birth of the second.

(*a*) 1 Rep. 95.

(*b*) 2 Vern. 660. And see *Lomax* v. *Holmden*, 1 Ves. 290.

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In *Driver* v. *Frank*, Mr. Justice Dampier says (*b*): "It has always been an object with the Courts of law and of equity to vest interests as soon as the words of an instrument will admit of it. Such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and distribution." And, after mentioning the several authorities on the subject, he proceeds—"Nothing arises from the expression 'from and immediately after the death,' &c. considered alone; much more effective words have been holden, in some of the cases above cited, not to prevent the vesting of estates. Here they point out the time when the party shall come into possession, and whether the devise be immediate or in remainder makes no real distinction. The case of *Lomax* v *Holmden* shews only that the *first* son, at the time of the *testator's* death, might take under the description of *first* son in the will; though a son

(*b*) 3 Man. & Selw. 32. Devise of all testatrix's real estates to the use of B. F., the husband of her niece, for life, and from and immediately after his decease, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of B. F. by his said wife (except the first or eldest son) severally and successively and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and, for default of such issue, to the use of F. S., youngest son of another niece of the testatrix, for life, &c.:—*Held*, that the remainder to the sons of B. F. (who had no children at the date of the will,) was not a contingent remainder, to such son as should be the second son of B. F. at the death of B. F., nor a vested remainder in the second or other son of B. F., liable to be divested by his becoming the first or eldest, by the death of his elder brother in the life time of B. F.; but a vested indefeasible remainder in the second or other son of B. F. who should be born living an elder: and therefore, B. F. having had four sons, of whom the second and third, and second and fourth, were in existence at the same time, but all, except the fourth, died in the life-time of B. F. without issue:—*Held*, that the surviving son was entitled to the devise.

had been born, and died, after the making of the will, and in the testator's life-time. It also shews that the same person may answer the description of 'primogenitus et secundus.' It proves only that a *second born son* may take under the description of *first*. As it shews that he may also take under the description of *second*, it rather turns the other way, and it appears to overturn the distinction between *first* and *eldest*." And Mr. Justice Bayley, in delivering his judgment in that case, says (*a*): "Inasmuch as I cannot see with certainty that this exception of the first or eldest son was to prevent an union of the family estates, as this is only the most probable of several possible motives, as (if this were the motive) it is reasonable to expect there would have been express words to divest it even after B. F.'s death, as the construction contended for would prevent any family settlement of this estate during B. F.'s life, and would in many possible cases leave the issue of the second, third, fourth, or other succeeding sons of B. F. unprovided for, and carry on the estate to persons who were more distant objects of the testatrix's consideration, and as the holding that this remainder vested in B. F.'s son *as soon as he had two sons together in esse* will satisfy every word in the will, and, as far as I can be certain, every motive of the testatrix, and as it falls in with the axiom that no remainder is to be deemed contingent which can be deemed vested, I am of opinion that this remainder vested in Edward Frank (the second son) upon his birth, and that it did not become divested upon his becoming his father's only son." All the arguments there used against contingent remainders will apply with equal force in this case. If Thomas Hawkins, the first son, had left issue, and John were held to take as second son, the issue of Thomas would have been disinherited (*b*).

(*a*) 3 Man. & Selw. 42. (*b*) The second point was withdrawn.

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Mr. Serjeant *Merewether*, for the defendants.—The settlement of the 16th & 17th June, 1756, begins with a recital, that, under the will of Philip Hawkins, ample provision had been made for the eldest son of the settlor; the first limitation, therefore, is made in favour of the second son; the second limitation provides for the contingency of the second son becoming by the death of the first an eldest son. The clear intent upon the whole is apparent, that no person who should become the eldest son should take the estate. It may be admitted, that, on the death of the settlor, the estate vested in Christopher Hawkins; but conditionally only—the condition being, that he should never become an eldest son. When Christopher became the eldest son, the defendant John was the second, and the estate vested in Christopher would, on his death without issue, pass to John. Upon the second limitation there can be no doubt. In default of there being a second or other son, and in case there should be only one daughter, the estate was limited to the eldest or only son: under this limitation John is clearly entitled to the estate called Allwarne, and to one third of the manor and barton of Trewinnard, and the mills called Trewinnard mills, and Colrogger. In *Driver* v. *Frank*, the doubt was, not as to whether or not the estate of the party could by law divest, but whether such was the intention of the testatrix.

Mr. Serjeant *Taddy*, in reply.—The case of *Driver* v. *Frank* went upon the ground of the disinclination of the Courts to construe those estates to be contingent which may be construed to be vested. "I can find no words," says Mr. Justice Le Blanc, "to warrant a divesting of the estate, once vested, in the event of a second or younger son becoming an eldest son, such as were the words of the will in *Fen* d. *Lowndes* v. *Lowndes* (*a*), and such words

(*a*) 4 Burr. 2247.

I conceive we cannot supply. It therefore appears to me that the intent is not sufficiently plain to limit the description of second and other sons to such person as shall answer such description at the death of the father, so as to make it contingent; nor to divest the remainder, once vested, in the event of the person in whom it vested becoming a first or eldest son."

The following certificate was afterwards sent:—

We have heard this case argued before us by counsel, and have considered it, and we are of opinion that John Hawkins, the fourth son of Thomas Hawkins, father of the said Sir Christopher Hawkins, did, under and by virtue of the said indenture of lease and release and settlement of the 16th and 17th June, 1756, on the death of the said Sir Christopher Hawkins, and in the events which have happened, take an estate in tail general in the messuages, lands, tenements, and hereditaments called Allwarne *alias* Alwerton *alias* Alwarnton *alias* Alwarton, and the grist mill thereto belonging, one third of the manor and barton of Trewinnard, and the mills called Trewinnard mills, and also all that messuage or tenement called Colrogger, being part of the premises comprised in the said indentures of lease and release and settlement of the 16th and 17th June, 1756.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
E. H. ALDERSON.

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Wednesday, May 22nd.

KEYS *v.* SMITH.

The defendant having obtained a special jury, the cause was called on for trial at the Assizes for Somerset, when four special jurors only being in attendance, and the plaintiff and defendant refusing to pray a tales, the cause stood over to the following Assizes. In the mean time the defendant became a prisoner in the Fleet. The Court, on his application, permitted the cause to be tried in London, at the first Sittings after the term in which the application was made.

THIS was an action against the defendant as the acceptor of a bill of exchange for 1,350*l.* The defendant having obtained a special jury, the cause was set down for trial at the last Assizes at Taunton, but, as only four of the special jurors appeared, neither the plaintiff nor defendant would pray a tales, but refused to try the cause, which, consequently, stood over for the following Assizes.

Mr. Serjeant *Coleridge*, in the last term, obtained a rule calling upon the plaintiff to shew cause why the cause should not be set down for trial in London or Middlesex, on the first day of the Sittings after the present term, on the affidavit of the defendant, which stated that, since the last Taunton Assizes, he had become, and still was, a prisoner in the Fleet; that he was in custody in this and several other causes, and that he believed he should be discharged from all the others, if he obtained a verdict in this action; and that he never accepted the bill in question, or authorized any other person to do so.

Mr. Serjeant *Wilde* shewed cause.—He submitted that the defendant had not shewn sufficient ground for the application, which, in effect, was to have the venue changed from the Assizes where the cause was entered for trial; that no delay or improper motive was attributable to the plaintiff for bringing his action in Somersetshire; that the defendant might, if he had thought proper, have prayed a tales at the last Assizes; and that the trial was postponed by his own act.

Mr. Serjeant *Coleridge*, contra.—If the Court refuse the application, the defendant must remain in prison till the next Assizes: whereas, if the cause were tried in

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London or Middlesex, it could produce no inconvenience to the plaintiff; and if the defendant obtained a verdict, he would the sooner obtain his discharge. He is ready to undertake to pay the plaintiff the difference of expense which may be occasioned to him by trying the cause here, instead of in Somersetshire; and it is sworn that the greater number of the plaintiff's witnesses are resident in London. The defendant further consents to have the cause tried here by a common jury.

Lord Chief Justice TINDAL.—It appears to me that this is not an unreasonable application; and, by acceding to it, we may prevent the protracted imprisonment of the defendant. Although it is not in due course, and, indeed, is contrary to the general practice of the Court, yet, as the case is of a very peculiar nature, and not likely to recur, we think the cause may be set down for trial in London, on the second day of the Sittings after term.

Rule absolute.

DALE *v.* GORDON, ESQ.

Wednesday, May 22nd.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the Court allowed the declaration, which was in the common form, to be amended (upon payment of costs) by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count.

THIS was an action against the defendant, the late sheriff of Herefordshire, for having taken insufficient sureties in a replevin bond. The declaration was in the common form. The replevin suit was instituted by a person of the name of Cawley against the present plaintiff and one Price; and, after issue joined, and notice of trial given, they respectively consented that the cause and all matters in difference should be referred to an arbitrator, which was accordingly done by an order of the Lord Chief Jus-

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tice. The arbitrator made his award, and declared that Cawley had no cause of action against the plaintiff and Price, and that the sum of *23l.* 10*s.* was due from Cawley to the plaintiff for rent; and he directed a verdict to be entered for the defendants in the replevin suit, namely, the now plaintiff and Price, and that the costs of the cause should be paid by Cawley.

A rule was obtained by Mr. Serjeant *Talfourd,* in the last term, calling upon the defendant to shew cause why the plaintiff should not be at liberty to amend his declaration, by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a count alleging that the plaintiff in the replevin cause did not prosecute his suit with effect or without delay, and that the arrears of rent due to the plaintiff had not been paid or satisfied.

Mr. Serjeant *Coleridge* now shewed cause.—He submitted that, as the plaintiff had shewn no ground for the amendment, the Court would not interpose. Besides, the arbitrator had no authority to direct a verdict to be entered for the defendants in the replevin suit, for, in *Jackson* v. *Clarke*(*a*), where an arbitrator, to whom a cause before at issue was referred by rule of court on motion, directed that a verdict in the cause should be finally entered for the plaintiffs, with *284l.* 12*s.* damages—it was held that he had exceeded his authority in directing the entry of a verdict; and the Court inclined to think that it could not be done in any case of a submission to arbitration, except on a reference from Nisi Prius, and by the intervention of a jury.

But the Court were of opinion that the amendment

(*a*) 1 M'Clel. & Younge, 200.

ought to be allowed, as it was merely intended to raise the question whether or not the defendant, as sheriff, was liable, by the introduction of certain facts upon the face of the record; and they directed that the plaintiff should be at liberty to amend the declaration, in the terms prayed, upon payment of the costs of the application.

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Rule absolute accordingly.

ISAAC *v.* SPILSBURY.

Wednesday, May 22nd.

THE plaintiff sued out a writ of fieri facias against the defendant, tested on the 15th March last, returnable on the 15th April, under which the sheriff of Kent seized certain of the defendant's goods on the 18th March, and on the 28th, Susannah Spilsbury, the defendant's wife, gave the sheriff notice that the goods were her property, as they were vested in trustees under her marriage settlement to her separate use. Shortly afterwards the defendant presented a petition to the insolvent debtors' court for his discharge, and executed the usual assignment to the provisional assignee. The sheriff having been ruled to return the writ—

The sheriff having seized the defendant's goods, under a fi. fa. sued out at the suit of the plaintiff:—*Held*, that there must be an actual claim to the goods, which might be followed by an action, before the sheriff could be entitled to relief under the interpleader act, 1 & 2 Will. 4, c. 58.

Mr. Serjeant *Spankie*, in the last term, applied to the Court, under the statute 1 & 2 Will. 4, c. 58, on behalf of the sheriff, for relief, and obtained a rule calling upon the plaintiff, the defendant, the provisional assignee of the insolvent debtors' court, and Susannah Spilsbury, the defendant's wife, or her trustees, to shew cause why they should not appear and state the nature and particulars of their respective claims to the goods seized, and then in the hands of the sheriff, and maintain or relinquish such claims; and why all further proceedings against the sheriff should

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not be stayed till such claims should be adjusted. Neither the provisional assignee nor the trustees of the defendant's wife having appeared, and the latter having disclaimed any intention to interfere, on the matter being now called on, it being placed in the peremptory paper—

Mr. Serjeant *Andrews*, on behalf of the plaintiff, shewed cause.—He contended that the plaintiff was entitled to the fruits of his execution, and that this was not a case to which the interpleader act, 1 & 2 Will. 4, c. 58, applied, as it was only meant to embrace cases in which conflicting claims were made by persons who evinced an intention to enforce them. Here, however, no such intent was manifested. Besides, neither the trustees of the defendant's wife, nor his provisional assignee, have appeared; and, if such a course as the present could be pursued by the sheriff, it would only be necessary, in case of a seizure by him, to make some supposititious claim to the goods, and thus put the execution creditor to the expense of inforcing his claim by a more circuitous process.

Mr. Serjeant *Spankie*, in support of his rule.—The sheriff is entitled to the relief he seeks, under the 6th section of the 1 & 2 Will. 4, c. 58; and, as the defendant has become insolvent, his provisional assignee may yet seek to inforce his claim, the defendant's effects being vested in him by the assignment. So, Mrs. Spilsbury's trustees may yet interfere. The case, therefore, must, under all the circumstances, be taken as falling within the meaning and spirit of the act, the express object of which was to protect sheriffs and other officers in the execution of process against adverse claims made upon persons having no interest in the subject-matter of such claims.

Lord Chief Justice TINDAL.—This motion is founded on the provisions of the late statute, 1 & 2 Will. 4, c. 58; but it appears to me that the facts of the case are not

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such as fall within it. The first section enacts, that, upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of law, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who *has sued* or *is expected to sue* for the same, it shall be lawful for the Court to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and to maintain or relinquish his claim: and the sixth section provides, "that, when any claim shall be made to any goods taken in execution under any process (by assignees of bankrupts and other persons, not being the parties against whom such process has issued), it shall be lawful for the Court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claim, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities thereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case." We must, therefore, see that a claim has been made to the goods in question, which may be followed up by an action or suit at law. It has been said, on behalf of the sheriff, that there are two claimants—first, the defendant's wife; but, when her claim is canvassed, it appears that all her property is vested in trustees under her marriage settlement, and they disclaim any right of interference. Her claim, therefore, is only of an equitable nature, and can only be attended to in a Court of equity. The other claimant is said to be the provisional assignee of the insolvent debtors' court; but he has never made any claim: and, so far from it, he has not even appeared to this application. I think, therefore, that the case does

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not fall within the provisions of the statute, and, consequently, that this rule must be discharged.

Mr. Justice PARK.—The statute requires that there be an actual claim to the goods by persons not being the parties against whom the process has issued. Here, however, there has been no such claim; and, by the terms of the rule, the sheriff himself calls on the several parties to appear and state the particulars of their respective claims.

Mr. Justice GASELEE.—It does not clearly appear that there has been an actual assignment of the defendant's estate to the provisional assignee of the insolvent debtors' court; and, even if there had, he has never made any claim, or appeared to shew cause against the rule.

Mr. Justice BOSANQUET.—I also think that this rule must be discharged. The alleged claimants are the defendant's wife, and the provisional assignee of the insolvent debtors' court; but it appears that all the defendant's wife's property is vested in trustees, and neither they nor the provisional assignee have made any claim.

Rule discharged (*a*).

(*a*) The sheriff, before he applies to the Court under the interpleader act, is bound to inquire into the nature of the claims set up; and if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him to pay the costs—*Bishop* v. *Hinxman*, 2 Dowl. P. C. 166. But, where the rule called upon assignees of a bankrupt who had made a claim under a fiat of bankruptcy which was afterwards superseded, the Court refused to compel the sheriff to pay the costs of the assignees' appearance—*Clarke* v. *Lord*, Id. 55. And semble that the sheriff ought to deny collusion—*Cook* v. *Allen*, Id. 11.

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BIRCHAM *v.* CREIGHTON.

Thursday, May 23rd.

If a defendant seeks to avail himself of his discharge under the insolvent debtors' act, 7 Geo. 4, c. 57, he must plead it generally, according to the provisions of the 61st section, and cannot give it in evidence under the general issue.

THIS was an action by the plaintiff, as indorsee, against the defendant, as the acceptor of a bill of exchange, to which he had pleaded the general issue only. On the morning of the trial, which took place at the Sittings in the last term, an application was made to Mr. Justice Bosanquet, the presiding Judge, to allow the defendant to plead his discharge under the insolvent debtors' act. The learned Judge, however, thought the application was too late, and refused to admit evidence of the discharge under the general issue; and the plaintiff having proved that he had given a valuable consideration for the bill, he obtained a verdict.

Mr. Serjeant *Bompas*, in the last term, obtained a rule calling on the plaintiff to shew cause why the verdict found for him should not be set aside and a new trial had; and why the defendant should not be at liberty, upon payment of costs, to amend his plea by withdrawing the general issue and pleading his discharge under the insolvent debtors' act.—The learned Serjeant produced affidavits which stated that the bill in question had been duly inserted in the defendant's schedule filed in the insolvent debtors' court, and that he had obtained his discharge since the commencement of the present action.

Mr. Serjeant *Jones* now shewed cause, on affidavits which stated that the defendant knew that the bill was in the hands of the plaintiff, and that he had given him a warrant of attorney as a collateral security, and had paid him 50*l.* on account; and that the defendant had not stated in his schedule that the plaintiff was a creditor, or that he did not know who the holder of the bill was, or that he had used due diligence to find him, but merely inserted the name of

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the drawer and the amount.—In order to render the discharge of a party under the act valid, not only the nature of the security must be specified in the schedule, but the name of the creditor, and, in the case of a bill of exchange, the name of the holder (*a*). The defendant applied to Mr. Justice Park for his discharge in December last; and that learned Judge refused the application, on the ground that the plaintiff had not been named as a creditor in the defendant's schedule. In *Baker* v. *Sydee* (*b*), it was decided that the insolvent act 53 Geo. 3, c. 102, discharged a prisoner from the demands of such creditors only who were named in his schedule as such; and therefore that his discharge did not interrupt the course of an action brought against him by a plaintiff whose claim the prisoner had not included in his notice and schedule. In *Reeves* v. *Lambert* (*c*), the insolvent did not know that the bill had been indorsed to the plaintiff, and the schedule contained a true description of the person to whom the insolvent was indebted, as he described the original debt, the original creditor, and the se-

(*a*) 7 Geo. 4, c. 57, s. 46—by which it is enacted, "That, after examination made into the matters of the petition and schedule of a prisoner, as herein-before directed, it shall and may be lawful for the court, or commissioner, or justices, upon such prisoner's swearing to the truth of his petition and schedule, and executing such warrant of attorney as is hereinafter directed, to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of the act, at such time as the said court, or commissioner, or justices, shall direct, as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule, or sworn to as aforesaid."

(*b*) 7 Taunt. 179.

(*c*) 4 Barn. & Cress. 214.

curity for that debt. The Court, therefore, will not allow the defendant to plead his discharge after verdict, particularly as he had made an unsuccessful attempt to do so before the delivery of the declaration; and the 61st section of the statute 7 Geo. 4, c. 57, expressly directs that a defendant may plead generally that he was duly discharged according to the act, without pleading any other matter specially.

Mr. Serjeant *Bompas*, in support of his rule.—It was not absolutely necessary for the defendant to plead his discharge under the insolvent debtors' act. Such a case bears no analogy to the late bankrupt act, which requires the bankrupt to plead his certificate; and it is a general rule, that, in an action of assumpsit, any thing amounting to an actual discharge, or tending to destroy the plaintiff's demand or cause of action, may be given in evidence under the general issue. It is clear that it was not imperative on the defendant to plead his discharge, as the 61st section of the statute merely states that it *may* be lawful to plead it generally: and that clause applies to those cases only in which such a plea may be necessary, viz. the case of a bond or security of a like nature, and not to a bill of exchange, which passes through different hands. When a person is discharged from a debt by an adjudication of the insolvent court, he is discharged from all securities respecting it at the same time. In *Ford* v. *Chilton* (*a*) it was held that the discharge need not be pleaded; and in *Stedman* v. *Martinnant* (*b*) the Court allowed the defendant, a bankrupt, to amend by pleading his certificate, after the plaintiff had obtained a verdict. As, therefore, the debt was clearly included in the defendant's schedule, and the bill expressly referred to, he is entitled to the indulgence he now seeks; particularly as the statutes passed for the

(*a*) 2 Sir W. Blac. 798. (*b*) 12 East, 664.

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relief of insolvent debtors have always received a liberal construction.

Lord Chief Justice TINDAL.—It appears to me that this rule must be discharged, and that one ground is sufficient for that purpose; for, I can entertain no doubt, that, on the construction of the statute 7 Geo. 4, c. 57, the discharge of a party under the insolvent debtors' act must be pleaded, and cannot be given in evidence under the general issue; and I should be surprised if this were doubted at the bar. It is so well known, that it is laid down as a general rule in Comyns's Digest (*a*), where it is said—"The defendant may plead in discharge of an execution against his body, &c., a discharge according to the statute for the relief of insolvent debtors." It is true, the language of the statutes there referred to is not precisely to the same effect as that of the 7 Geo. 4; but the principle on which the rule proceeds is, that the discharge is a statutory answer to the plaintiff's demand, and does not go to the destruction of the debt. The 61st section was meant to relieve a defendant from the nicety which was previously required in pleading his discharge specially: it enacts that it shall and may be lawful for any person who has become entitled to the benefit of the act, his or her heirs, executors, or administrators, to plead generally that such person was duly discharged according to the act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially. The defendant must, therefore, still plead his discharge under the act, though less particularity is required than before; for, the debt is not actually gone, but merely the plaintiff's remedy against the person of his debtor. But pleading the discharge generally is altogether different from pleading the general issue, which

(*a*) Tit. "Pleader," (2 G. 16).

disaffirms the contract and completely answers the plaintiff's cause of action. There can be no doubt, therefore, that the discharge, if intended to be relied on as a defence, must be pleaded: and, although here the defendant had his attention drawn to this mode of defence in December last, when he made an application to a Judge at chambers for his discharge, yet he neglected to avail himself of it, but lay by till the morning of the trial, which took place in April last, when he applied to the presiding Judge for leave to withdraw the general issue and plead his discharge under the insolvent act. It was then too late for him to ask such a favour. This of itself appears to me to be a sufficient ground for discharging the present rule; and it is only necessary further to observe on this point, that, in *Knight* v. *Preston* (*a*), the defendant pleaded his discharge specially under the statute 1 Geo. 3. So, in *Ladbroke* v. *James* (*b*), where the insolvent act 10 Geo. 2, gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time—it was held, that, in pleading a discharge by a court of sessions, it was necessary to allege that the party was in prison or had surrendered himself before that time; and that merely stating that he was duly discharged by the court of quarter sessions from his imprisonment aforesaid, was not sufficient. But I am strongly inclined to think that the defendant is not discharged from the plaintiff's demand; for, it appears from the affidavits, that the plaintiff is the holder of the bill, but that the defendant has neglected to insert his name in his schedule, although he had paid him 50*l.* on account.

Mr. Justice PARK.—I am of the same opinion. When the 61st section of the act is looked at, there can be no pretence for saying that the defendant can take advantage

(*a*) 2 Wils. 332. (*b*) Willes, 199.

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of his discharge, without pleading it *generally*. This may be assimilated to a case where a defendant who had become bankrupt previously to the passing of the statute 5 Geo. 2, c. 30, was obliged to plead his bankruptcy specially; but that statute provided that he might plead it generally. A defendant, therefore, who has become insolvent, must plead his discharge in general terms, and cannot give it in evidence under the general issue; for, the 61st section expressly enacts, that, if any suit be brought against any such person, it shall and may be lawful for him to plead generally that he was duly discharged according to the act, without pleading any other matter specially. With regard to the merits, it appears to me, that, upon the affidavits, the defendant has not brought himself within the provisions of the statute, so as to entitle him to be discharged from the plaintiff's claim, as he did not set out his name as a creditor in his schedule, although he must have known that he was the holder of the bill, having paid him 50*l.* on account. At all events, the defendant's attorney ought to have known that it was necessary to plead his discharge, as he applied for it to me by summons in December last, before the declaration was delivered.

Mr. Justice GASELEE.—I am of the same opinion. It was clearly incumbent on the defendant to plead his discharge; and his attorney must have thought so, as he has not applied for a new trial on account of the refusal of the learned Judge to admit evidence of the discharge under the general issue, but merely seeks to amend the plea, on payment of costs. The provision allowing a defendant to plead his discharge generally, in the 61st section of the 7 Geo. 4, is not altogether new: it was not introduced in that act for the first time; a like proviso is to be found in the 53 Geo. 3, c. 102 s. 32; and, from the passing of that act to the present time, no instance can be found

in the books, nor has any case been adverted to, to shew that a discharge of an insolvent debtor can be given in evidence under the general issue. The case of *Ford* v. *Chilton* does not appear to me to apply to the present. There, the defendant sought to be relieved from custody on motion, on the ground that he had been discharged under the statute 9 Geo. 3, c. 26. The plaintiff had not proceeded to trial, as the plea was over-ruled on demurrer; whilst, here, he has obtained a verdict: and all the Court there said was, "he is at liberty to plead his discharge, to prevent going to gaol, but is not obliged so to do." As to the proposed amendment, to withdraw the general issue, and plead the defendant's discharge—I think, on looking at the affidavits, that it ought not to be allowed. The cause has been tried, and the plaintiff has obtained a verdict. The defendant must have known that the plaintiff was the holder of the bill, or, at all events, he had reason to believe so, as he had paid him 50*l.* on account, and yet he did not insert his name as a creditor in his schedule. Even if we were to grant a new trial and allow the defendant to plead his discharge, it seems to me that the plaintiff would still be entitled to a verdict.

Mr. Justice BOSANQUET.—I am of the same opinion. There can be no doubt, on the construction of the 61st section of the 7 Geo. 4, but that the discharge of the defendant should have been pleaded, and that in this respect the case stands on the same footing as a certificate obtained under the bankrupt act: the language as to the mode of pleading generally is similar in both. An application was made to me at chambers, to discharge the defendant on filing common bail, but I thought he was not entitled, as he had not inserted the name of the plaintiff as a creditor in his schedule. That was sufficient to put the defendant on his guard, and he had an opportunity of pleading his discharge, and putting it on the record, in-

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stead of which, he lay by till the morning fixed for the trial; and I thought it was then too late to allow him to make the proposed amendment. This rule therefore must be—

Discharged.

Thursday, May 23rd.

An insolvent went to prison on the 18th of June, and, on the following day, petitioned the insolvent court for his discharge. On the 19th the sheriff seized his goods under a fi. fa. issued on a cognovit given by the insolvent to a creditor on the 11th. On the 23rd the insolvent executed the assignment to the provisional assignee, who immediately gave the sheriff notice not to sell, notwithstanding which he did so: —*Held*, that the sale was a wrongful act by the sheriff, and that he was liable to the ultimate assignee in an action of trover.

GROVES, Assignee of BOWLER, *v.* COWAN and two Others.

THIS was an action of trover, brought by the plaintiff as assignee of one Thomas Bowler, an insolvent debtor, against the defendant Cowan, the sheriff of the county of Surrey, and one of his officers, and an execution creditor who had sued out process against Bowler. At the trial, before Mr. Justice Gaselee, at the Sittings in London after the last Hiliary Term, it appeared, that, on the 11th June, 1832, Bowler gave a cognovit to a creditor (one of the defendants), who caused judgment to be entered up, and, on the 18th, sued out a fieri facias, directed to the defendant Cowan, as sheriff of Surrey, who seized Bowler's goods under it on the 19th; that, on the 18th, Bowler went to prison, and, on the following day, petitioned the insolvent debtors' court for his discharge, and, on the 23rd, executed an assignment of all his estate and effects to the provisional assignee, who immediately gave notice to the defendant Cowan and his officer not to sell Bowler's goods; notwithstanding which, they caused them to be sold on the 27th; and, on the 6th September following, the usual conveyance was executed by the provisional assignee to the plaintiff. The jury having found a verdict for the plaintiff, against the sheriff and the officer—

Mr. Serjeant *Jones*, in the last term, obtained a rule nisi that the ver dict might be set aside and a nonsuit entered, on the ground that, under the above circumstances, trover could not be maintained, and that the

plaintiff's remedy, if any, was by an action against the sheriff for money had and received.

Mr. Serjeant *Andrews* and Mr. Serjeant *Bompas* now shewed cause.—The verdict was proper, as the case falls expressly within the provisions of the 34th section of the statute 7 Geo. 4, c. 57, which enacts, that, "in all cases, where any prisoner who shall petition the insolvent debtors' court for relief under that act shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, shall and may be a creditor or creditors for the same, under that act." The object of that clause was, that a judgment creditor should not have an advantage over the general body of creditors; and, as the sheriff had notice from the provisional assignee of Bowler's effects not to sell, but sold in defiance of such notice, he was liable in trover to the plaintiff as the ultimate assignee. The execution did not change the property, and the clause in question operates as a supersedeas of the execution. Although, in *Notley* v. *Buck* (*a*), Lord Chief Justice Tenterden said—"The seizure, being prior to the act of bankruptcy, will be lawful and right: it is not necessary to say whether the sale be lawful or tortious"—yet that applied to the statute 6 Geo.

(*a*) 8 Barn. & Cress. 160; S. C. 2 Man. & Ryl. 68.

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4, c. 16, s. 108, which is distinguishable from the 7 Geo. 4, which expressly enacts that no person shall, after the commencement of the imprisonment of his debtor, avail himself of any execution issued upon any judgment obtained upon a cognovit, either by seizure or sale: and the cases of *Cooper* v. *Chitty* (*a*), and *Carlisle* v. *Garland* (*b*), which are confirmed in *Balme* v. *Hutton* (*c*), are decisive to shew that the present action is maintainable, as the insolvent went to prison two days previous to the seizure, and the sale took place after the notice given by the provisional assignee not to sell. The sheriff, therefore, has been guilty of a conversion, and is liable for the value of the property, which was vested in the plaintiff as Bowler's assignee.

Mr. Serjeant *Jones* and Mr. Serjeant *Talfourd*, in support of the rule.—The sheriff is not liable to any action under the 34th section of the statute, although he might be responsible to the Court: at all events, he cannot be held liable in trover. The seizure was made before the assignment was executed by Bowler to the provisional assignee; and the sheriff had, by the seizure, a special, though not an absolute property in the goods, and from that moment might maintain an action against a wrong-doer. The question depends in some measure on the 11th section of the statute, which enacts that the prisoner shall, at the time of subscribing the petition, execute a conveyance and assignment to the provisional assignee; and here, Bowler petitioned the insolvent court on the 19th June, and did not execute the conveyance until the 23rd—three days after the seizure by the sheriff. The assignment to the plaintiff relates back to the conveyance to

(*a*) 1 Burr. 20.

(*b*) 5 Moore & Payne, 102; S. C. 7 Bing. 298. The judgment of the Court of Common Pleas in this case was affirmed on error in the Exchequer Chamber, on the 26th November, 1833. Vide post.

(*c*) Ante, Vol. 2, p. 1.

the provisional assignee; and although, by the bankrupt law, the assignee becomes entitled to the property of the bankrupt on the committing of the act of bankruptcy, yet the property of an insolvent debtor can only vest in the provisional assignee on the execution of the conveyance, and not from the day of the imprisonment or petitioning the court for his discharge. Besides, by the 11th section, it is provided, that, in case the petition shall be dismissed by the court, the conveyance to the provisional assignee shall be null and void. On the day, therefore, that Bowler executed the assignment, namely, on the 23rd June, he had a general property in the goods, subject to the special property of the sheriff, which was never afterwards divested; and it is quite clear that the sheriff was not a wrong-doer at the time of the seizure, neither can he be made so by keeping the goods in his possession, or by the subsequent sale. When the 34th section is looked at, it is obvious that it refers only to the creditors of the insolvent, and not to the sheriff, who, after the seizure, must be deemed an officer of the Court; and he cannot be considered as a creditor, neither can he derive any benefit from the produce of the insolvent's estate. If, indeed, the plaintiff had brought an action for money had and received, he might have been enabled to divide the proceeds of the sale among the general creditors. In *Notley* v. *Buck*, the action was for money had and received, and the Court said: "The duty of the sheriff is, to pay the money to the assignees, to whom it legally belongs, and not to the creditor, to whom it does not belong. And, this being his duty, if he does pay the money to the creditor, he places himself in the ordinary situation of a man who, having in his hands the money of A., thinks fit to hand it over to B. The wrongful payment will be no discharge, but he will still be liable to an action at law for money had and received, at the suit of the assignees to whom the money belongs. The seizure being prior to the act of bankruptcy, will be lawful and right. It is not necessary to say whether the

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sale be lawful or tortious." That case was decided on the 108th section of the statute 6 Geo. 4, c. 16; and there the property vested in the assignee by relation from the time of the act of bankruptcy, whilst here no such relation exists. In *Morland* v. *Pellatt* (*a*), the action was against the execution creditor. If the plaintiff had sued for money had and received, the sheriff might have paid the amount into Court; but, if he be liable in trover, he may be subjected to damages beyond the produce of the sale: and he cannot be guilty of a conversion of goods of which he had the special property from the time of the seizure. In *Balme* v. *Hutton*, it was decided, on the authority of *Cooper* v. *Chitty*, that trover was maintainable against the sheriff for selling goods the property of a bankrupt, after notice of an act of bankruptcy, on the ground that the bankrupt's estate was vested in the assignee by relation from the time of the act of bankruptcy. Although here the provisional assignee gave the sheriff notice not to sell, it had no operation whatever, as the goods of the insolvent were previously vested in the sheriff by the seizure, and the conveyance to the provisional assignee was immaterial. The sheriff could have no means of knowing that Bowler had petitioned the insolvent court for his discharge, or that he meant to apply for it; and, as the execution was never abandoned or avoided, the sheriff could not withdraw; and, although he might have been liable to a special action on the case for selling after notice not to do so, yet he cannot be liable in trover; for, in order to maintain such an action, the plaintiff must have the right of possession as well as an absolute property in the goods.

Lord Chief Justice TINDAL.—I am of opinion, that, under the circumstances of this case, trover is maintainable against the sheriff. The facts are shortly these:— On the 18th of June, 1832, the insolvent Bowler went to

(*a*) 8 Barn. & Cress. 722.

prison. On that day an execution was sued out against him at the suit of a creditor, upon a judgment obtained by him on a cognovit given by Bowler on the 11th, and, on the 19th, the sheriff seized his goods. On the 23rd of June, Bowler filed his petition in the insolvent debtors' court; and, on the 23rd, executed an assignment to the provisional assignee. Before the sale by the sheriff under the execution, namely, on the 27th of June, the sheriff and his officer had notice not to sell, as Bowler's effects were vested in the provisional assignee of the insolvent court; and that, if the sheriff sold, he would be liable to an action: notwithstanding which, the sheriff sold the goods. But the plaintiff contends, that, even without reference to the 34th section of the statute 7 Geo. 4, c. 57, he is entitled to maintain trover against the defendants, because the assignment of the insolvent's estate and effects to him had reference to the provisional assignment, and, consequently, that the absolute right to all the insolvent's property was, before the sale, vested in him. Although the sheriff entered under the writ of execution on the 19th, which was four days before the insolvent executed the provisional assignment, the mere fact of entry and seizure did not change the property in the goods. But it is not necessary to agitate that question further, as the point is, whether or not this case falls within the intent and meaning of the thirty-fourth section of the statute. Neither does the question depend on the subsequent assignment to the plaintiff, but is whether the sheriff could legally proceed to sell the insolvent's property under an execution sued out at the instance of a judgment creditor on a cognovit, after he had received notice from the provisional assignee of the insolvent's estate not to sell. The clause in question enacts "that, in all cases where any prisoner who shall petition the insolvent debtors' court for relief under that act shall have executed any warrant of attorney to con-

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fess judgment, or shall have given any cognovit actionem, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, shall and may be a creditor or creditors for the same under that act." Now, in this case, after the imprisonment of the debtor, the judgment creditor sought to avail himself of the judgment he had obtained on the cognovit, by the sale of the insolvent's effects subsequently to the assignment. The legal and true construction to be put on the 34th section, and to prevent a judgment creditor from availing himself of an execution issued upon a judgment obtained upon a cognovit, is, that the clause should operate as a statutory supersedeas, and have the effect of staying the execution; and, if the sheriff sells after notice not to do so from the provisional assignee, he is liable to be sued in trover. A similar construction has been put on the 108th section of the statute 6 Geo. 4, c. 16, by which it is enacted "that no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment

obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

But it has been said in this case, that the 34th section of the 7 Geo. 4, does not, in terms, declare an execution sued out on a judgment on a cognovit to be void, or give any action against the sheriff for selling after notice of the assignment to the provisional assignee; but similar words are introduced into the bankrupt act, 6 Geo. 4, and we ought not to vary the construction which has been put upon that act by the Court of King's Bench, namely, that trover is maintainable against the sheriff if he proceeds to sell after notice not to do so by the assignee of a bankrupt. But it has been further objected for the defendants, that the plaintiff's only remedy was by an action for money had and received. The simple question then is as to the form of action. It is true that such an action might have been maintained. Although, in *Notley* v. *Buck*, the action was for money had and received, still I do not know, where a sheriff has been guilty of a tortious conversion of goods after an express notice not to sell, as in this case, why he should not be liable to an action of trover. Although a party *may* waive a tort, yet it is in his option whether he will do so or not. It is true that, if the plaintiff had brought an action for money had and received, the sheriff might have paid the proceeds of the sale into Court, or tendered the amount. Where, indeed, the person against whom an execution has issued places the amount indorsed on the writ in the hands of the sheriff in the first instance, there is no conversion by the latter; but, where the money in his hands arises from a conversion by sale of the goods, after notice not to sell by the assignee, the latter has a sufficient cause of complaint to maintain trover for such conversion. That such an action may be maintained, was decided in *Cooper* v. *Chitty*, which came before the Court under circumstances precisely similar to the pre-

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sent; namely, an action of trover against the sheriff for selling goods after he had notice that the property in them was in a third person, and not in the party against whom the execution issued. Although the authority of that case has been since frequently questioned, it has very lately been confirmed in *Balme* v. *Hutton*, and must therefore now be considered as law, and we are bound to act upon it. But, considering this case with reference to the 34th section of the 7 Geo. 4, I think that trover is maintainable against the sheriff, and that the plaintiff's remedy is not restricted to an action for money had and received: the proceeds of the sale might fall far short of the value of the goods, and fail to indemnify the estate of the insolvent for the damage it may have actually sustained: and, as the officer had notice as well as the sheriff, the rule for a nonsuit must be discharged.

Mr. Justice PARK. — I had intended to make some observations; but, after the elaborate judgment pronounced by my Lord Chief Justice, it may suffice to say that I heartily concur with him on every point.

Mr. Justice GASELEE.—Whatever opinion I may have entertained on former occasions, I am bound by the authority of the later decisions, and particularly by the case of *Balme* v. *Hutton*, to say that the present action is maintainable against the sheriff. He has acted in direct opposition to the notice not to sell, which was given him by the provisional assignee three days before the sale. This case, therefore, falls within the principle established in *Cooper* v. *Chitty;* and, although the seizure might have been lawful, yet the sale, *after notice*, amounted to a conversion. It has been urged that the sheriff had a special property in the goods from the time of the seizure: but that argument does not appear to me to be tenable; for, it must be admitted that the general pro-

perty was in Bowler, the insolvent. When the sheriff and his officer had notice of the claim of the provisional assignee, they were not without a remedy, as the interpleader act was passed in October, 1831, and the sheriff might have applied to the Court for relief under the 6th section of that statute.

Mr. Justice BOSANQUET.—I agree with my Lord Chief Justice and my two learned brothers in thinking that the sheriff is, under the circumstances, liable in trover, not for the seizure of the goods, which took place before any step was taken by the insolvent to avail himself of the benefit of the act, but for the sale, which was wrongful after the notice from the provisional assignee. Although Bowler petitioned the insolvent debtors' court for his discharge on the 19th of June, he did not execute the conveyance to the provisional assignee till the 23rd, four days after the seizure. The 11th section of the statute requires the conveyance to be executed at the time of subscribing the petition. By the conveyance, all the insolvent's estate and effects were vested in the provisional assignee, and the subsequent assignment to the ultimate assignee had relation to the date of the conveyance to the provisional assignee. This, therefore, may be assimilated to a case of bankruptcy, where the bankrupt's property vests in his assignees by relation to the act of bankruptcy. The 34th section of the statute 7 Geo. 4, c. 57, positively enacts that no person shall avail himself of any execution issued upon any judgment obtained upon cognovit, either by seizure and sale of the property of the prisoner, or by sale of such property theretofore seized. The object of this clause was to defeat the rights of execution creditors on judgments obtained on warrants of attorney or cognovits, as it not only declares that they shall not avail themselves of the execution, but that they shall come in as creditors with the rest. The prior seizure on behalf of

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the execution creditor being thus defeated, the provisional assignee of the insolvent gave the sheriff and his officer notice not to sell, notwithstanding which they afterwards proceeded to a sale, although the property in the goods was not in the execution creditor, but in the provisional assignee, for the benefit of the whole body of creditors, of whom the execution creditor was to be one. The question then is, whether the sale was not a wrongful act by the sheriff, the right of the execution creditor having been defeated, and the statute operating at a supersedeas of the execution. But it has been said, that, at all events, the sheriff could only be liable in an action for money had and received for the proceeds of the sale, and that there is a wide distinction between that form of action and trover, as the latter might subject him to vindictive damages. But we must look at both sides of the question, and consider the interest of the creditors: the goods might have been sold for much less than they were worth. The sale, therefore, was a wrongful act, so as to render the sheriff liable in trover. The case of *Notley* v. *Buck* appears to me to be in point; so far from being a decision in favour of the sheriff, it establishes the principle that the sheriff ought not to receive the money, or, in other terms, that he should not sell; and that, if the goods be improperly disposed of, the party may waive the tort, and sue for the proceeds in an action for money had and received. This rule therefore must be dicharged.

Rule discharged.

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HOLLAND *v.* BIRD and SKATE.

Saturday, May 25th.

In an action on the case for an excessive distress for rent, the second count alleged that the defendants having distrained the plaintiff's goods for rent, the plaintiff tendered the rent in arrear and the costs of the distress, and requested the defendants to redeliver the goods, but that they wrongfully refused to do so or to accept the sum tendered: —*Held*, that this was in form and substance a count in case, and was properly joined with others of a like description.

A broker having distrained the goods of a tenant for rent in arrear, he signed an agreement, in writing, drawn up by the broker, that if he, the tenant, did not pay the rent on or before a given day, the broker might re-enter and distrain again:— *Held*, that this did not estop the plaintiff from afterwards complaining of an excessive distress, made in consequence of the rent not being paid at the stipulated time.

THIS was an action on the case for an irregular and excessive distress for rent. The first count of the declaration stated that the plaintiff occupied certain apartments in a dwelling-house as tenant to the defendant Bird; that *3l.* 6*s.* was in arrear from the plaintiff to Bird for rent; and that the defendant wrongfully distrained goods of the plaintiff of the value of *50l.*, &c. &c. The second count was as follows:—"And whereas also the defendants took, seized, and distrained divers other goods and chattels of the plaintiff, to wit, &c. &c., as and for and in the name of a distress for certain rent, to wit, the sum of *3l.* 6*s.*, then due and in arrear from the plaintiff to the defendant Bird for and in respect of certain apartments with the appurtenances in and parcel of a certain dwelling-house with the appurtenances, situate &c., before then held and occupied by the plaintiff astenant there of to Bird; and thereupon afterwards, and whilst the defendants had the said goods and chattels under such distress as last aforesaid, to wit, on &c., at &c., the plaintiff tendered and offered to the defendants, in satisfaction and discharge of the said last-mentioned arrears of rent, and of the costs and charges of the said last-mentioned distress, a certain large sum of money, to wit, the sum of *6l.*, the same being then and there a sufficient and proper sum to satisfy and discharge the said arrears of rent, together with all the costs and charges of the said last-mentioned distress, and then and there requested the defendants to redeliver and restore the said last-mentioned goods and chattels to the plaintiff; and, although the defendants then and there ought to have accepted and received the said last-mentioned sum of *6l.* from the plaintiff in discharge of such arrears of rent, and

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costs and charges of the said last-mentioned distress, and to have redelivered and restored the said goods and chattels to the plaintiff; nevertheless the defendants contriving and wrongfully and injuriously intending to harass, oppress, and aggrieve the plaintiff in that behalf, did not nor would when they were so requested as aforesaid, or at any time since, accept or receive the said sum of 6*l.* so tendered as aforesaid, from the plaintiff, in satisfaction and discharge of the said last-mentioned arrears of rent, and the costs and charges of the said distress, or redeliver or restore the said goods and chattels, or any of them, or any part thereof, to the plaintiff, but then and there wholly neglected and refused so to do, and wrongfully and injuriously kept and withheld the said goods and chattels from the plaintiff, and converted and disposed thereof to their own use. The third count charged the defendants with not having sold the plaintiff's goods for the best price that could have been obtained for them. The fourth count alleged that the defendants sold all the plaintiff's goods: and the last count was in trover. The defendants pleaded the general issue.

At the trial before Mr. Justice Bosanquet, at the Sittings at Westminster, in the last Easter Term, it appeared that the plaintiff occupied certain rooms or apartments in a house belonging to the defendant Bird, situate in King Street, Soho, at the weekly rent of 5*s.* 6*d.*; that, on the 22nd of November last, the defendant Skate, a broker, distrained certain of the plaintiff's goods for rent in arrear to Bird to the amount of 3*l.* 6*s.*; that the plaintiff, in order to avoid the expense of keeping a man in possession, signed an agreement drawn up by Skate, at the foot of which the articles distrained were enumerated in an inventory, and by which the plaintiff agreed, that, if he did not pay the rent on or before the Saturday following, Skate might re-enter and resume possession of the articles distrained; that, the plaintiff having failed to pay the rent on the Saturday, the defen-

dants on the Monday following seized all the plaintiff's furniture in the house, and even took away some of his wearing apparel, the goods alone being worth from 35*l.* to 40*l.* The plaintiff shortly afterwards tendered the defendants 6*l.* for the amount of the rent due and the costs of the distress, which they refused to accept; saying they had sold the goods. For the defendants, it was insisted, that, as the plaintiff had not paid the rent on the Saturday, according to the terms of his agreement, the plaintiff was estopped from complaining of the second seizure. But the learned judge was of opinion that the agreement did not authorize the defendants to take away more than was reasonably sufficient to satisfy the rent due and the costs of the distress. The jury found a verdict for the plaintiff, for 35*l.*, and said that they were of opinion that the distress was excessive, and that the goods had not been sold when the tender was made by the plaintiff.

Mr. Serjeant *Talfourd*, in the last term, obtained a rule nisi that the judgment might be arrested, on the ground that the second count of the declaration was framed in trespass, whilst all the others were adapted to an action on the case; or that the verdict might be set aside and a new trial had, on the ground that the agreement signed by the plaintiff authorized the defendants to take all the plaintiff's goods, if the arrears of rent were not paid on the Saturday following the first distress.

Mr. Serjeant *Adams* and Mr. Serjeant *Bompas* now shewed cause.—The second count is for the defendants' refusal to restore the plaintiff's goods upon tender of the rent in arrear and costs of the distress, and is in form and substance a count in case. In *Branscomb* v. *Bridges* (*a*), where the goods of a tenant were distrained for rent in ar-

(*a*) 3 Stark. Ni. Pri. Cas. 171; S. C. 1 Barn. & Cress. 145.

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rear after the amount had been tendered, it was held that he might maintain an action on the case for an excessive distress: and, on its being objected in banc, that, as the rent had been tendered before the distress was made, and no subsequent demand and refusal of it were proved, the taking of the goods was without any colour of right, and was therefore properly the subject of an action of trespass —the Court said: "Supposing that trespass would lie, still the plaintiff was at liberty to waive the trespass, and bring an action on the case." That case is stronger than the present, as there the tender was made before the distress, whilst here it was made after the second seizure, though before the sale of the goods. The statute 11 Geo. 2, c. 19, s. 15, provides, that, where any distress has been made for rent, and any irregularity or unlawful act shall be afterwards done by the party distraining, he shall not be deemed a trespasser *ab initio*, but the party aggrieved may recover full satisfaction for the special damage he shall have sustained, in an action of trespass, *or on the case*, at the election of the plaintiff: and, although in *Winterbourne Morgan* (*a*), it was held that trespass was maintainable against a person who continued in possession after the five days allowed by the statute 2 Wm. & Mary, s. 2, c. 5, yet Lord Ellenborough said that "he should have had great doubt whether the action of trespass was well founded, if one of the trespasses charged and proved had not been the taking and removing of the goods from the premises, and the disturbance of the plaintiff's possession of his house, after the time when by law they ought to have been removed." Here, however, the second seizure was lawful, as there can be no doubt but that rent was in arrear from the plaintiff to Bird; and, as the tender was not made till after the seizure, the plaintiff's proper remedy was by an action on the case. Secondly—with respect to the agreement, it never was the intention of the contracting

(*a*) 11 East, 395.

parties, that, if the plaintiff did not pay the rent due on or before the Saturday following the first seizure, the defendants should be entitled to take all his goods, the rent due only amounting to 3*l.* 6*s.*; and it is quite clear that the second levy was excessive, as the defendants removed all the plaintiff's goods, which were worth between 35*l.* and 40*l.*; and before the sale, the plaintiff tendered more than was due for rent and the costs of the distress, which the defendants refused to take, and also refused to redeliver the goods. This action, therefore, was properly brought, and the plaintiff is entitled to retain his verdict.

Mr. Serjeant *Talfourd* in support of his rule.—The second count is substantially a count in trespass, and is therefore misjoined with the others, which are all framed in case. In *Branscomb* v. *Bridges* the tender was made before the distress; and all that the Court decided was, that an action on the case was maintainable, on the ground that the distress was excessive. Here, however, the tender was made after the seizure, and if the defendants had been guilty of any excess in making it, they must be considered as trespassers. There was no irregularity after the seizure, as in *Winterbourne* v. *Morgan*, which is an authority to shew that trespass may be maintained: and in Chitty on Pleading (*a*), it is said—"In the case of a distress for rent, upon the equity of the statute 2 W. & M. c. 5, a sale of the distress after tender of the rent and costs would be illegal; and trespass in such case is the proper remedy."

Secondly, as to the agreement—The parties meant, that, if the rent were not paid on the day therein specified, the defendants were to be at liberty to take all the plaintiff's goods; and the Court will not look at the value put upon

(*a*) Vol. 2, p. 722, n., 4th edit.

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them by the jury. The subject-matter of the contract or agreement was not as to the value of the goods, but that the rent due from the plaintiff should be satisfied: and it was as a matter of convenience to him, as well as to avoid the expense attendant on keeping a man in possession, that the broker consented to withdraw from the premises after the first seizure. No fraud has been imputed to either of the defendants, neither has it been suggested that the agreement was unduly obtained, and it appears upon the face of it to be a fair and bona fide arrangement between the parties.

Lord Chief Justice TINDAL.—It appears to me that the rule which has been obtained by the defendants—first in arrest of judgment, and secondly for a new trial—ought to be discharged. The first objection, as to the arrest of judgment, is, that the second count is misjoined with that which precedes and those which follow it, as it virtually contains and discloses the subject-matter of an action of trespass, whilst all the other counts are framed in case. The form and substance of the second count is, that the defendants distrained the plaintiff's goods for the rent of apartments occupied by the plaintiff as tenant to the defendant Bird; that the plaintiff tendered the defendants the rent in arrear and the costs of the distress, which the defendants ought to have accepted and to have redelivered the goods to the plaintiff; but that, when requested, they refused to do so, but wrongfully and injuriously kept and withheld the goods from the plaintiff, and converted and disposed thereof to their own use. In form, therefore, it is a count in case, because it contains matter of nonfeasance only, and no direct or immediate act is complained of, to amount to a trespass. In substance also it is a count in case, which is the proper form of action. Although it is true (but upon that point it is not necessary to express an opinion) that a wrongful taking and a subsequent detainer may be a ground of tres-

pass; yet there are many cases where it is held that a party may waive the wrongful taking, and sue in case on the subsequent detainer; as for instance in trover, where, although the taking in the first instance might have been wrongful, and might amount to a trespass, yet the plaintiff may waive the trespass, and sue in trover for the subsequent detainer and conversion. It is quite clear that in this case trover would lie; and trover is only a subdivision of the action on the case; and if so, case, the more expanded form of action, is equally maintainable. It seems to me that the case of *Branscomb* v. *Bridges* (*a*) is stronger than the present, because a sufficient tender made before a distress at common law renders the whole of the proceeding illegal; but a sufficient tender after distress only makes the subsequent detainer illegal. Even under the statute of Westminster the 1st, 3 Edw. 1, c. 31, which gave a remedy by an action on the case for taking outrageous toll, the taking toll where none was due has been held outrageous within the equity of the statute (*b*), and consequently the subject of an action on the case. With respect to the application for a new trial, it appears to me that the true construction of the agreement entered into between the plaintiff and Skate at the time of the first distress, is, not that the defendants should be entitled to take *all* the plaintiff's goods in case he failed to pay the rent on the day therein specified, but merely that they might re-enter and make a second seizure; for, without the agreement, the defendants would have had no right to enter on the plaintiff's premises a second time: and the intention of the parties was, that, if they did so, the plaintiff as owner of the goods agreed that the defendants should stand in the same situation as if a person had remained in possession from the time of the first distress. I therefore

(*a*) 1 Barn. & Cress. 147. (*b*) 2 Inst. 220.

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think that the action was properly conceived, and that the agreement afforded no defence.

Mr. Justice PARK.—I am of the same opinion on both points. There is no misjoinder, as the second count is in substance framed in case, and the plaintiff's ground of complaint was the excessive distress for which an action on the case is the proper remedy.

Mr. Justice GASELEE.—The second count contains no allegation of a trespass; and, even if there had been, there can be no doubt but that the plaintiff might waive it, and sue for the tort. The construction put upon the agreement by my Lord Chief Justice appears to me to be the true one: all that the parties meant was, that the defendants should be in the same situation as if a man had remained in possession from the time of the first distress.

Mr Justice BOSANQUET.—The plaintiff's ground of action was for an excessive distress, and an action on the case was the proper remedy. I entertain no doubt as to the agreement. We must look at the intention of the parties; and it appears to me to be clear that it could not have been intended that the defendants should take all the plaintiff's goods to satisfy the sum of 3*l.* 6*s.* alleged to be due to Bird for rent. This rule therefore must be—

Discharged.

Saturday, May 25th.

DOE, on the Demise of FRY, *v.* ROE.

The xvth rule of Michaelmas Term, 4 Will. 4, does not apply to declarations in ejectment.

MR. Serjeant *Goulburn* moved for judgment against the casual ejector. The declaration was intituled "Tuesday, the 21st of May," being the day preceding the term. The learned Serjeant observed that the Court, in the last term, inclined, to think that the xvth rule of Michaelmas Term, 3 Will. 4, did not apply to an action of ejectment (*a*).

(*a*) See *Doe* d. *Haines* v. *Roe*, 2 Moore & Scott, 619.

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Lord Chief Justice Tindal.—This appears to me to be immaterial; because, if the notice to the tenant to appear is regular, it is sufficient; and, when he has appeared, the plaintiff may deliver a new declaration intitled of the preceding term generally.

Rule absolute.

DANSEY, Demandant; LEE, Tenant; CROWTHER, Vouchee.

Saturday, May 25th.

The Court allowed a recovery to be amended by inserting "Holy Trinity" before "Kingston-upon-Hull," on an affidavit that the property intended to pass was situate in the parish of The Holy Trinity, at Kingston-upon-Hull.

MR. Serjeant *Wilde* moved to amend this recovery by inserting the words "Holy Trinity" before those of "Kingston-upon-Hull." In the recovery the estate was described as being situate in the parish of Kingston-upon-Hull.

On the learned Serjeant's producing an affidavit that there was no such parish, and that the estate was situate in parish of The Holy Trinity, at Kingston-upon-Hull—

Fiat.

COOK *v.* CLARK, COLE, and RICHARDS and WIFE.

Monday, May 27th.

The defendant, an officer of the Southwark court of requests, entered the plaintiff's house in search of a person against whom a warrant of execution was issued by the commissioners of that court. The party was not in the house; and the jury found that the defendant had no reasonable grounds for supposing that she was:—*Held*, that, notwithstanding, the defendant was entitled to the fourteen days' notice of action under the 21st section of the 46 Geo. 3, c. lxxxvii, (Southwark court of requests act,) as he entered the house bona fide in pursuit of the party named in the warrant.

THIS was an action of trespass. The first count of the declaration stated that the defendants, on the 3rd January, 1833, broke and entered the plaintiff's dwelling-house, in the parish of Christ-Church, in the county of Surrey, and made a great noise and disturbance therein, and assaulted one Caroline Cook, the daughter of the plaintiff, and beat and ill-treated her, and forced and broke open the doors of the house, and damaged and spoiled the locks with

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which they were fastened. The second count was for breaking and entering the house, and breaking open the doors.

The defendants pleaded—first, the general issue; and, secondly, as to the breaking and entering the house, that, before and at the time of the issuing of the summons thereinafter mentioned, one Frances Simmonds was indebted to the defendant Richards in the sum of twenty-one shillings, to wit, within the jurisdiction of the court of requests for the town and borough of Southwark, and that Frances Simmonds resided within the jurisdiction of the said court; that she being so indebted to the defendant Richards, he, on the 5th June, 1832, duly and according to the form of the statute in such case made and provided, caused to be issued out of the said court of requests a certain summons, whereby the said Frances Simmonds was commanded to appear personally before the commissioners of the said court to answer the demand of Richards for the said debt; which summons, on the 6th June, 1832, within the jurisdiction aforesaid, was duly and properly served upon the said Frances Simmonds; and such proceedings were thereupon had, that, on the 8th June, 1832, it was duly adjudged by the said court of requests that the said debt was due from the said Frances Simmonds to the defendant Richards, and it was ordered that she should pay the same, together with 2*s.* 6*d.* costs, to the clerks of the court, for the use of Richards, at and after the rate of 8*s.* every four weeks, until the said debt and costs should be fully paid, and that, on failure in either of such payments, the clerks of the said court should forthwith issue execution against the body of the said Frances Simmonds for the whole or so much of the said debt and costs as should then remain unpaid. The defendants then alleged that Frances Simmonds did not pay the said debt and costs, or any part thereof, according to the exigency of the said judgment and order, but therein wholly failed and made default; and such pro-

ceedings were thereupon had, that, on the 2nd January, 1833, a certain writ or warrant of execution was duly issued out of the said court of requests, directed to the chief bailiff of the town and borough of Southwark, and to his deputy officer [or] officers duly authorized and appointed to execute the processes of the said court of requests, requiring them to take the said Frances Simmonds if she should be found within the jurisdiction of the said court, and safely lodge and detain her in the Borough compter, or in the county gaol of Surrey, until the sum due to the defendant Richards should be paid; which said warrant afterwards and before the return thereof, and before the said time when &c. in the declaration mentioned, to wit, on the 3rd January, 1833, was delivered to the defendant Clark, who then and at the said time when &c., was one of the officers of the said chief bailiff of the town and borough of Southwark, in due form of law to be executed; by virtue of which said warrant, the defendants Cole and Richards's wife, as his servants, and by his command, having reasonable and sufficient cause to suspect and believe, and suspecting and believing that Frances Simmonds was in the said dwelling-house in the declaration mentioned in which &c., afterwards and before the time appointed for the return of the said warrant, to wit, at the said time when &c. in the declaration mentioned, in execution of the said order and warrant, peaceably and quietly entered into the said dwelling-house in which &c., the outer door thereof being then and there open, in order to take the said Frances Simmonds, by virtue of the said warrant, as they lawfully might for the cause aforesaid; and, in so doing, the defendant Clark, as such officer as aforesaid, and the other defendants, Cole and Richards's wife, as his servants as aforesaid, did necessarily and unavoidably make a little noise and disturbance, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the

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plaintiff on that occasion; which were the supposed trespasses in the introductory part of the plea mentioned, and whereof the plaintiff had above thereof complained against the defendants; and the defendant Clark duly returned to the court of requests what was so done upon the said warrant: and this the defendants are ready to verify &c. The plaintiff added a similiter to the first plea, and replied de injuria to the second; upon which issue was joined.

At the trial before Lord Chief Justice Tindal, at the last Assizes for the county of Surrey, it appeared that the plaintiff rented a house in the parish of Christ-Church, part of which he let out to lodgers; that the front door was generally kept open; that the defendant Clark was an officer of the high bailiff of Southwark, and duly appointed to execute the processes of the Southwark court of requests. It was proved, on behalf of the plaintiff, that, on the 3rd of January last, the defendants came to his house and inquired for Mrs. Simmonds; that, on being informed she was not there, the defendants Clark and Cole said they would search for her notwithstanding; that they accordingly went into every room, and, on the plaintiff's daughter passing Clark in the passage that led to the plaintiff's apartments, he took out his staff and struck her, and used opprobious language: but Mrs. Simmonds was not found in the house.

For the defendants it was objected that the action could not be maintained, as the plaintiff had not given the notice of action required by the 21st section of the Southwark court of requests act, 46 Geo. 3, c. lxxxvii (*a*),

(*a*) By the 21st section it is enacted, "That no action or suit shall be commenced against any person or persons for any thing done in pursuance of the two recited acts of the 22nd and 32nd years of his said late Majesty, King George the 2nd, and of this act, or of any or either of them, or on account of any order, determination, judgment, or decree, of the commissioners appointed in the manner

which was passed to explain and render more effectual two acts passed in the 22nd (c. 47) and 32nd (c. 6) years of his late Majesty Geo. 2, for the more easy and speedy recovery of small debts within the town and borough of Southwark and the several parishes and places in the said acts mentioned. His Lordship, however, refused to nonsuit the plaintiff, but left it to the jury to say whether the defendants had used unnecessary violence towards the plaintiff's daughter, and whether they had reasonable ground to believe that Mrs. Simmonds was in the house at the time they entered in search of her. The jury found a verdict for the plaintiff, damages 10*l.*: and said that they were of opinion that the defendants had no reasonable grounds for supposing that Mrs. Simmonds was in the plaintiff's house at the time of the alleged trespass. Leave, however, was reserved to the defendants to move to enter a nonsuit, in case the Court should be of opinion that the notice of action under by the 21st section of the statute was necessary.

Mr. Serjeant *Andrews* having in the last term obtained a rule nisi on the ground, that, under the circumstances, the action could not be maintained, as the plaintiff had not given the defendants the notice required by the 21st section of the act—

Mr. Serjeant *Spankie* now shewed cause.—It was the duty of the defendants to make due and reasonable

directed by the said two recited acts, until fourteen days' notice thereof shall be given in writing, to be left at the office of the clerks of the Borough court, or after sufficient satisfaction or tender thereof hath been made to the party or parties aggrieved; or after six calendar months next after the cause of action shall arise; and the defendant or defendants in such actions and suits, and every of them, may plead the general issue, and give this act and the special matter in evidence at any trial or trials which shall be had thereupon."

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inquiries as to whether or not Mrs. Simmonds was in the plaintiff's house before they commenced their search. The jury found that they had no reasonable grounds to suppose that she was there; and, as in fact she was not there, the defendants were not acting in pursuance of the statute, but without authority; and, whether they did so or not, was a question for the jury. Although the defendant Clark was armed with a warrant, it only authorized him to apprehend Simmonds, but not to enter the plaintiff's house: he, therefore, cannot be said to have acted under colour of the statute. There is a wide distinction between a local and personal, and a general act of parliament: the 46 Geo. 3, is of the former description, and limited to place, and to persons residing within the particular district to which the act applies. Where an officer exceeds his authority, as in the present case, no notice is necessary. In *Beechey* v. *Sides* (*a*), in an action by a person who, for a supposed malicious injury to property, had been taken into custody by another who bonâ fide believed that he was acting in execution of the malicious trespass act, 7 & 8 Geo. 4, c. 30, it was held that he was entitled to the notice of action given by the 41st section of the statute; and Lord Tenterden said (*b*): "It has uniformly been held, that, where a party bonâ fide believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause:" but, here the defendants made no previous inquiry to justify them in entering the plaintiff's house in quest of Simmonds. In *Edge* v. *Parker* (*c*), where the assignee of a bankrupt entered the premises of a third person to seize goods which were the property of the bankrupt, it was held that it was not necessary that an action against him should be brought within three months after the fact committed, the act of

(*a*) 9 Barn. & Cress. 806. (*b*) Page 809.
(*c*) 8 Barn. & Cress. 697.

the assignee not being done "in pursuance of the statute," 6 Geo. 4, c. 16, s. 44. There, the defendant, as assignee, seized goods on the plaintiff's premises, which were the property of the bankrupt: but, here, Mrs. Simmonds was not found in the plaintiff's house; and, in order to entitle the defendants to the protection of the statute, they should have ascertained whether she was there or not, before they entered. The warrant of the commissioners did not authorize them to enter the plaintiff's house to take Mrs. Simmonds. As they had no express or implied authority so to do, they were trespassers, and liable to the plaintiff: the act he complains of was not an act done *in pursuance of the statute.*

Mr. Serjeant *Andrews*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—The only question in this case is, whether we are satisfied that what was done by the defendant Clark and the other defendants who acted as his assistants, was done honestly and bonâ fide in pursuance of the statute 46 Geo. 3 and the two previous acts to which that statute refers, or the powers given by those acts. The words of the 21st section of the 46 Geo. 3. are, "that no action or suit shall be commenced against any person or persons for any thing done in pursuance of that act, or *on account of any order*, determination, judgment, or decree of the commissioners, until fourteen days' notice thereof shall have been given in writing." Now, there can be no reasonable doubt but that Clark, the officer, thought himself justified in entering the plaintiff's house in search of Mrs. Simmonds, under a warrant of the commissioners, which authorized her apprehension wherever she might be found within the jurisdiction of the court. Under process at common law, the house of a third person would afford no privilege or protection to the person of

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a debtor, and sheriff's officers are in the daily habit of entering in pursuit; for, although a man's house may justly be said to be his own castle, yet it is not so as to others. No doubt, in such a case, the officer enters at his peril; and if he fail to discover the object of his search, he is liable to an action for damages at the suit of the party whose house he has entered: but, on the other hand, if he finds the party there, he is entitled to take him. Now, there is no distinction between process sued out of a court established under a local act of parliament and proceedings at common law. If an officer enter a house bona fide in pursuit of a person named in the warrant, and afterwards finds that he has been mistaken in supposing the object of his search to have been there, he is entitled to the protection afforded by the 21st section of the act, to tender satisfaction or reasonable amends to the party aggrieved; and here, if the defendant Clark had had notice, he might, and in all probability would, have done so. This case, therefore, appears to me to fall within the general principle, that statutes which protect officers in the execution of their duties must receive a liberal construction. The case of *Edge* v. *Parker* is distinguishable, as it is quite clear that there the party who entered the house of a third person had no jurisdiction, nor could he justify the entry under the statute 6 Geo. 4, c. 16, by virtue of which it was alleged he entered; for, although the 27th section of that act authorized him to enter a house where the goods of the bankrupt might be, yet, by the 29th section, he was bound to obtain a search-warrant before he entered the house of a third person in search of the bankrupt's goods. The party in that case, therefore, must have known that he had not acted honestly or in discharge of his duty, as he had not obtained a search-warrant previously to entering the house. It has been said, that, as the jury have here found that there was no

reasonable ground for the defendants to suppose that Mrs. Simmonds was in the plaintiff's house, he was entitled to a verdict. But the objection for the defendants, as to the want of notice, had been previously raised, and I reserved the point for the consideration of the Court, but allowed the case to go to the jury to assess the damages the plaintiff might have sustained for entering his house and the assault on his daughter, in case the Court should think that the defendants were not entitled to the notice prescribed by the act.

Mr. Justice PARK.—Much stress has been laid on the opinion expressed by the jury; but we cannot take it into consideration, because the objection as to the want of notice was taken, and the point saved for the consideration of the Court, before the case was left to the jury, which his lordship did for the purpose of their assessing the damages for the alleged trespass. Although the 46 Geo. 3 is a local act, yet all statutes passed for the protection of officers of justice must be taken in pari materia by the Courts, and construed largely. By several local turnpike acts, toll-gate keepers are entitled to notice before an action is commenced against them for taking exorbitant toll, or demanding toll where none was due, in order that they may have an opportunity of tendering amends to the complainant; and here the words of the 21st section are as strong as they possibly can be, namely, "that no action shall be commenced against any person for any thing done in pursuance of the act, or on account of any order or decree of the commissioners, until fourteen days' notice thereof shall be given in writing, or after sufficient satisfaction or tender to the party aggrieved." It is quite clear that that clause was meant to protect officers of the Southwark court of requests in the discharge of their duty; and, although here the defendants might not have

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acted strictly bonâ fide, yet the case falls within the principle laid down by Lord Tenterden in *Beechey* v. *Sides*.

Mr. Justice BOSANQUET.—I am also of opinion that this case comes within the principle established in *Beechey* v. *Sides*. It is not necessary that the defendants should be able to justify the entering the plaintiff's house under the statute, to entitle them to the notice required by the 21st section; if they acted bonâ fide and under colour of the statute, or on account of the order or decree of the commissioners of the Southwark court of requests, it is sufficient. This case differs from that of *Edge* v. *Parker*: there the assignee could have no pretence for entering the house of a third person in pursuance of the statute 6 Geo. 4, c. 16, as he had not previously obtained the search-warrant required by the 29th section of the act. But here the defendant Clark had a warrant to take Simmonds wherever she might be found within the jurisdiction of the Southwark court; and, as it appeared that the outer door of the plaintiff's house was generally kept open, the simple question is, whether Clark and the other defendants as his assistants entered the house bonâ fide and with the intention of putting the warrant in force against Simmonds. It is not necessary to go into any distinction between a local and general act, as here Clark was authorized to act under the warrant of the commissioners, who were empowered to issue such warrant; and if he had reasonable ground for supposing that he was acting in pursuance of the act, he was entitled to the notice of action given by the 21st section. The rule for entering a nonsuit must therefore be made—

Absolute.

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Monday, May 27th.

ROYSTON and Wife, Administratrix, &c. *v.* SARAH HANKEY.

Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—*Held*, sufficient to entitle such person to take, and retain possession of the property.

THIS was an action of trover, brought by the plaintiff, and his wife, as administratrix of one Charles Baker, against the defendant, to recover certain property belonging to the intestate at the time of his death.

At the trial, before Mr. Baron Bayley, at the last Assizes at Chester, it appeared that the plaintiff's wife was Baker's only child, and that he went to reside with the defendant about five years since, and had continued to live in her house to the day of his death, which took place on the 31st December last; and that his property consisted of a cow, two calves, an ass, and several articles of household furniture. The defendant proved that Baker had lived in her house for the period above stated, and that, when he first came, he agreed to pay her *2s.* per week. The defendant's daughter stated, that the cow and ass were paid for by her mother; that Baker had frequently said that she was to have them, as well as his furniture, for what he owed her; and that he said so on Christmas-day last; that Baker had not paid the defendant any rent for a long time past; and that he had three shillings per week from a benefit club, for some time previously to his death, he being a cripple and unable to work. The learned Judge told the jury, that, if there were an agreement entered into between Baker and the defendant that she should have his prperty for what he owed her, she would be entitled to; but that, if there were no such agreement, the plaintiff would be entitled to a verdict; and that the question rested chiefly on the testimony of the defendant's daughter; and it was for the jury to say whether they believed her statement to be true. The jury found a verdict for the defendant.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi

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that this verdict might be set aside, and a verdict entered for the plaintiffs, or that a new trial might be had, on the grounds that there was not sufficient evidence to establish a gift of the intestate's property to the defendant; and that the Judge should have so decided, and not left the question to the jury, there being no proof offered of a delivery to make it a gift or donatio mortis causa, or any testamentary instrument as required by the statute of frauds.

Mr. Serjeant *Jones* now shewed cause.—The intestate resided constantly at the defendant's house for five years previous to his death, and was indebted to her for rent. No point of law was raised at the trial, and the question was properly left to the jury. The intestate meant that the defendant should take his stock and furniture in satisfaction of the debt due to her for rent.

Mr. Serjeant *Wilde*, in support of his rule.—There was no evidence of a sale or gift by Baker, the intestate, to the defendant, and she could not acquire any right of possession over his property merely because he lived in her house and was indebted to her for rent. He never parted with the dominion over his property; and the defendant's daughter merely stated that he had frequently said that her mother should have it for what he owed her. The case, therefore, clearly falls within the mischief intended to be guarded against by the statute of frauds; and there was no proof of a delivery of any part of the property to the defendant, but, on the contrary, proof that the intestate exercised acts of ownership over it down to the time of his death. The cases of *Bunn* v. *Markham* (*a*) and *Irons* v. *Smallpiece* (*b*) are decisive to shew that a verbal gift of a chattel, without actual delivery of possession, will not pass the property to the donee.

(*a*) 2 Marsh. 532; 7 Taunt. 224. (*b*) 2 Barn. & Ald. 551.

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Lord Chief Justice TINDAL.—Although this case is not altogether free from doubt and difficulty, yet I think the verdict may be sustained by the evidence adduced for the defendant at the trial. The defendant's daughter stated that the intestate had frequently said that her mother should have his property for what he owed her, and that he said so on Christmas-day, which was six days before his death. If, indeed, there had been this single declaration only, the question would be very different. It appeared that Baker had lived in the defendant's house for five years previous to his death, and that he had become a cripple, and was unable to work. There was no complete or absolute delivery required, as both the intestate and the defendant lived under the same roof, and it was proved that he was indebted to her for rent, and all his property was on the premises at the time of his death.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—The defendant's house was occupied by herself and the intestate. His furniture was probably used for the accommodation of both, and the defendant proved that the cow and ass were paid for by herself

Mr. Justice BOSANQUET.—I am also of opinion that there is no ground for disturbing this verdict. The learned Judge who tried the cause has expressed no dissatisfaction, and I think there was sufficient evidence to warrant the jury coming to the conclusion that the goods of the deceased were to be taken by the defendant in satisfaction of the rent previously due to her; and, as both parties resided in the same house, it appears to me that there was a sufficient delivery to the defendant, and that the verdict for her must stand.

Rule discharged.

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Monday, May 27th.

Two creditors of an insolvent were appointed trustees under a composition deed. One of them never executed the deed, and the other brought an action of replevin in their joint names without the consent of the former. On an application by him to have his name struck out as a co-plaintiff, the Court refused to interfere, there being no suggestion of fraud.

EMERY and MIDDLETON *v.* MUCKLOW and HANCOX.

THIS was an action of replevin. Mr. Serjeant *Adams*, in the last term, obtained a rule calling upon the plaintiff Emery to shew cause why the name of the plaintiff Middleton should not be struck out of the declaration and subsequent proceedings in this cause, as plaintiff, unless the plaintiff Emery should give him a sufficient indemnity against the consequences of his, Middleton's, name being so retained as plaintiff; and why Emery should not pay Middleton the costs of this application to the Court. The rule was obtained on the affidavits of the plaintiff Middleton and his attorney, which stated, that, on the 22nd of January last, a deed of assignment was executed by one James Mucklow to the plaintiffs Emery and Middleton (they being respectively creditors of Mucklow), as trustees of his estate and effects, for the benefit of themselves and the other of Mucklow's creditors; that the deed was not executed by the plaintiff Middleton, and that he wished to withdraw from the trusteeship; that accordingly, on the 7th of February last, he and his attorney told Emery and a solicitor employed by him in Mucklow's affairs, that he, Middleton, did not intend to act as a trustee in the said affairs, but was determined, if the Court would allow him, to withdraw from such trusteeship; that, on the 16th of February, the plaintiff Middleton caused notice to be given to Emery and two other attorneys employed by him in Mucklow's affairs, of his, Middleton's, intention not to act as a trustee under the deed; and that a notice was sent to each of Mucklow's creditors, informing them, that, although the name of Middleton, in conjunction with that of Emery, had been inserted in the deed of assignment executed by Mucklow for the benefit of his creditors, yet, no creditor or creditors having signed the deed, Middleton did not intend to take upon himself the office of trus-

tee; and that he entirely disavowed any participation in Emery's acts and proceedings; that he, Middleton, had not at any time since acted as trustee under the deed; that, on the 6th of February last, a distress was made by the defendant Thomas Mucklow, the father of Mucklow who executed the deed, upon certain goods being on the premises of the latter, for arrears of rent claimed to be due from him to the defendant Thomas Mucklow; that, thereupon the plaintiff Emery and his attorney called upon Middleton, when Emery informed Middleton of the distress, and said that they were going to replevy, and that he, Middleton, being unacquainted with the nature of a replevin, asked Emery what it was, when he replied that it was to prove the debt in a Court of law; that Emery's attorney said it would not affect him, Middleton, at all, and that he had nothing to do with it, and was not answerable for Emery's acts. The plaintiff Middleton further deposed, that he did not authorize Emery to replevy the goods in the joint names of himself and Middleton, nor did he enter into or execute a replevin and bond on replevying the same; that he had since understood and believed that Emery, without any authority from him, Middleton, proceeded to replevy the goods in the joint names of himself and Middleton; that the proceedings in the replevin suit had been removed into this Court; that, on the 12th of March last, he, Middleton, was served with a demand of declaration in an action of replevin at the suit of the said defendant Thomas Mucklow and another; that, on the 4th of April following, Middleton's attorney gave notice to Emery and his attorney, not to use his, Middleton's, name as a plaintiff in the replevin suit, and that he did not intend to declare or proceed in such action; and that, notwithstanding such notice, the plaintiff Emery had since declared, and was proceeding in the said action in the joint names of himself and Middleton as co-plaintiffs therein.

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Mr. Serjeant *Wilde* now shewed cause, on an affidavit by Emery, that Middleton had agreed to be a party to the deed of assignment, and had acted as Mucklow's trustee after it was executed by Mucklow. The learned Serjeant submitted, that, under the circumstances, the Court would not interfere; as, although the plaintiff Middleton might not have concurred in carrying on the replevin suit, still that it did not appear that he objected to act as trustee in the first instance; that, as both the plaintiffs had equal rights under the deed of assignment to them for the benefit of themselves and the rest of Mucklow's creditors, and the insolvent himself having executed the deed, he could not afterwards withdraw his property from the plaintiffs as trustees; and that one of them could not decline to act, as they had a common interest in the disposal of Mucklow's estate and effects, which had been duly assigned to them under the trust deed.

Mr. Serjeant *Adams*, in support of the rule.—Although Middleton might have assented to become a party to the trust deed, yet, as he did not execute it, he might repudiate it, whenever he thought proper. Besides, it does not appear that he ever acted under it, nor can Middleton's estate be considered as legally vested in him, as it must be assumed that he only consented to become trustee in case all the creditors would come in and execute the deed; and it appears that none of them had signed it when the present suit was commenced.

Lord Chief Justice TINDAL.—It appears to me that we have no authority to interfere in this case, because Middleton has not shewn us that his name was introduced as a co-plaintiff in the replevin suit against his will, or with a fradulent motive; but, as he consented to become a co-trustee with Emery of Mucklow's estate for the benefit of them-

selves and the rest of the creditors, he cannot now withdraw himself; and no authority has been pointed out to us where the Court have interfered in such a case. Both the parties, therefore, must proceed in the action of replevin: and this will not deprive Middleton of any right, as he may have recourse to the ordinary mode, and release the defendants from any cause of action he may have against them. The question will then arise, whether the release was given with a view to fraud. Both the plaintiffs had an assignment of all Mucklow's property, by virtue of the deed; and both consented to become trustees for the benefit of the creditors, and Mucklow executed the instrument accordingly. If we accede to this application, it will have the effect of putting an end to the replevin suit, and Middleton has a remedy in his own hands, by releasing the action, if he thinks it prudent to do so. I think, therefore, that this rule ought to be discharged.

Mr. Justice PARK.—Unless Middleton had shewn us that he did not consent to act as a co-trustee with Emery in the first instance, or that the latter had been guilty of fraud in using his name as a co-plaintiff in this suit, I think we ought not to interfere. There is no suggestion of fraud; and, although a Court of equity might exercise its discretion, yet we should be going further than has ever been done if we were to accede to this application; particularly, as the plaintiff Middleton may, if advised, release the defendants from all actions and suits he may have against them.

Mr. Justice GASELEE.—This is the simple case of two trustees being made co-plaintiffs in a suit, where, if one chooses to go on contrary to the wish of the other, the dissenting party may release the action as far as he is concerned.

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Mr. Justice BOSANQUET.—I fully concur with the Court in thinking, that, under the circumstances of this case, we have no authority to interfere. Middleton has his remedy by pursuing another course.

Rule discharged, without costs.

Tuesday, May 28th.

The twenty days' notice required to be given before bringing up a prisoner under the compulsory clauses of the Lords' act, must expire before the first day of the term in which he is brought up.

HAYWARD *v.* PRIEST.

THE defendant, a prisoner in the custody of the Warden of the Fleet, was brought up under the compulsory clauses of the Lords' act, when it appeared that the notice was dated and served upon him on the 6th instant, and consequently did not expire till the 26th. The rule to bring up the defendant was dated on the 24th, and he was brought in at the sitting of the Court this morning.

PER CURIAM.—The twenty days' notice should have expired before the first day of the present term, or, at all events, before the rule to bring up the defendant was taken out; although, if the defendant were to be brought up at the Assizes, the twenty days might expire within the preceding term: but the words "within seven days of the next term," must be taken with reference to the last antecedent. *Jones's* case (*a*), where the notice was

(*a*) Chapman's Practice, 316. In Michaelmas Term, 1830, Jones, an insolvent, was brought into Court on the 11th November, in pursuance of a notice served on the 18th October, requiring him to deliver in his account within the first seven days of the term next ensuing the date of the notice. The insolvent objected that the notice ought to have been served twenty days before the first day of term. Mr. Justice J. Parke, upon referring to a case decided by Mr. Justice Buller, upon the same objection, held the notice sufficient.

held sufficient, though not served twenty days before the first day of the term in which the prisoner was brought up, was the decision of a single Judge.

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The prisoner was remanded.

CHAPMAN and Another, Assignees of RICHARDSON, a Bankrupt, *v.* WALTON.

Tuesday, June 6th.

THIS was an action on the case brought by the plaintiffs, as assignees of one Richardson, a bankrupt, for negligence in procuring insufficient memorandums to be indorsed on five policies of insurance upon a ship and goods, which policies had been originally effected by the defendant for the bankrupt, so as to enable the vessel to call at certain intermediate ports out of the course of the voyage described in the policies.

The declaration set forth five policies of assurance on goods on board the ship Sprightly, on a voyage at and from London to St. Thomas's, with leave to call at Madeira and Teneriffe, made by the defendant as agent of the bankrupt; and averred that the goods mentioned in the policies and declarations thereon had been shipped to be conveyed on the voyage, and that the bankrupt was interested therein to the amount of the sums insured; that the ship sailed on the voyage, and arrived at Madeira, and there unloaded goods to a large amount, to wit, goods insured by the first and second policies, which were by the declarations thereunto annexed declared to be of the value

The defendant, an insurance broker, had been employed by a merchant to procure policies to be underwritten upon a ship and cargo from London to St. Thomas's, with leave to call at Madeira and Teneriffe. On the arrival of the ship at Madeira, the supercargo advised the merchant of an alteration in the course of the voyage. The merchant put the letter containing the information into the hands of the defendant with instructions to do the needful with it. The defendant accordingly procured memorandums to be indorsed on the policies, containing permission to call at certain places not mentioned in the policies. The vessel was lost at a place not covered by the memorandums. In an action against the broker for negligence in not having procured alterations conformable with the instructions contained in the letter:—*Held*, that the evidence of insurance brokers and underwriters as to what alterations of the policies a skilful insurance broker ought, in their judgment, to have procured, having in his possession the policies, the invoices of the goods and the bills of lading, and also the letter of the supercargo, and being instructed to do the needful—was admissible.

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of 752*l.* 14*s.* 6*d.*—of all which premises the defendant had notice; that the bankrupt was desirous that the policies should be altered, and that the ship might proceed to the Canaries, and retained and employed the defendant as an insurance broker for reward to cause and procure the said several policies of insurance to be so respectively altered, by and with the consent of the said several insurers respectively, that such policies of insurance might respectively contain a liberty for the said ship or vessel, with the remainder of the said goods so by the said policies of insurance respectively insured as aforesaid on board thereof, to proceed to and call at, amongst other places, the said islands called the Canaries, for all purposes, as part of the voyage to be included in the said several policies; that the defendant accepted the retainer and employment, and undertook and promised the bankrupt to use due care and diligence in and about the endeavouring to procure the policies to be so altered with the consent of the insurers; that the defendant might and could before the loss have caused and procured the policies to be so respectively altered in manner aforesaid, by and with the consent of the assurers, if he the defendant had endeavoured so to do, or had used due and proper care and diligence in the premises; that he did not use such diligence, but that by his neglect the policies remained unaltered; that the ship sailed from Madeira, and proceeded to one of the Canaries called Grand Canary, out of the voyage mentioned in the policies; and that the ship and the remainder of the goods were there lost by the perils of the sea; that, if the policies had been altered, the insurers would have been liable to pay the loss; but that, by reason of the premises, they were not liable, and had refused to pay, whereby the plaintiffs had been deprived of the benefit which they would have gained from the policies if altered.

The cause was tried before Lord Chief Justice Tindal, at the Sittings in London after the last Michaelmas Term. The facts were as follow:—In the year 1830, the policies

in question were effected upon the ship Sprightly and her cargo, for a voyage at and from London to St. Thomas's, with leave to call at Madeira and Teneriffe. In January, 1831, the ship arrived at Madeira, where part of her cargo was sold, and wines were taken on board. The supercargo wrote thence to the owner, giving an account of his progress, and informing him that he had taken the wines on board. The letter was as follows:—

"Funchal, 24th January, 1833.

"Sir,—I have now nearly completed, and expect to sail to-morrow, or next day at furthest, for the Canaries, from whence, as I have taken more wines here than I at first contemplated, it is my intention, for your government, to visit one or more of the West India islands—say Barbadoes, St. Kitt's, and St. Thomas's; in one or other of which I am told I cannot fail of meeting a market for the wines, and such other part of the cargo as I do not dispose of in the Canaries. I have not sold a single package of linens, but could have disposed of a much larger quantity of cottons. With respect to the linens I have no fear, as *in Canary* any reasonable quantity is desirable."

This letter was received by the bankrupt on the 16th February, and was given by him to the defendant, with instructions to "do the needful" in procuring a new insurance on the wines, and extending the leave in the original policies so as to cover the altered voyage. The defendant accordingly, on the 22nd, effected an insurance on the wines, describing the voyage in the policy to be at and from Madeira to the Canaries, and at and from thence to the islands of Barbadoes, St. Kitt's, and St. Thomas's: and on the same day he indorsed on each of the five policies and caused to be subscribed by the underwriters the following memorandum:—

"In considertion of an additional premium of 10*s.* per cent. upon £——, it is hereby agreed that the Sprightly may proceed to St. Kitt's $\frac{\text{and}}{\text{or}}$ Barbadoes."

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The vessel was lost at the island of Grand Canary, by the perils of the sea, in the month of March, 1831. The bankrupt, upon receiving advice of the loss, gave information thereof to the defendant, and directed him to abandon. The notice of abandonment given by the defendant to the underwriters described the voyage insured to be from London to Madeira, the Canaries, and St. Thomas's; and stated the ship to have been lost by wreck at the Grand Canary Island. The underwriters refused to pay the loss, on the ground that the memorandums indorsed on the several policies contained no leave to call at the island of Grand Canary. It was proved that Teneriffe is the only one of the Canary Islands that has a port, the others having merely roadsteads; and that the town of Canary is the capital of the island of Grand Canary.

On the part of the plaintiff it was urged, that, to a person acquainted with the Canary Islands and the geographical particulars relating to those islands, the letter above set forth conveyed information that the vessel was intended to touch and stay at Grand Canary; and that it was clearly so understood by the defendant was evident from the policy effected upon that letter, which described the insurance on the wines to be from Madeira to the Canaries, &c., in the plural, and also from the notice of abandonment, which in the description of the voyage insured mentioned the Canaries generally.

On the other hand it was contended, that, in common parlance, a voyage "to the Canaries" was understood to mean a voyage to Teneriffe; and five witnesses (insurance brokers and underwriters) were called, and the policies, the bills of lading and invoices of the goods, and the letter of the 24th January, 1831, being put into their hands, they were asked what alterations of the policies, in their judgment, a skilful insurance broker ought to have procured, having these documents in his possession, and being

instructed to do the needful: to which they answered, in substance, that they thought that ample justice would be done to the instructions by procuring the alterations that had been made.

This evidence was objected to on the part of the plaintiff, but admitted on the authority of *Rickards* v. *Murdock* (*a*). There, a merchant resident at Sidney shipped goods for England on board the ship C., and, by another ship that sailed after her, wrote to an agent in England, and desired him, if he received that letter before the C. arrived, to wait for thirty days, in order to give every chance of her arrival, and then effect an insurance on the goods. The letter was received, and the agent, having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it before the insurance was effected. The C. never arrived. In an action on the policy, no fraud was imputed to the plaintiff, but several underwriters were called for the defendant, who stated, that, in their opinion, the matters not communicated were material; and the jury, being of opinion that a material part of the letter had been concealed, found a verdict for the defendant. It was held that the evidence of the underwriters' opinion was properly received; and that, even without it, the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, and that consequently the policy was void.

There was also evidence to shew that the underwriters would not have consented to extend the leave to the island of Grand Canary, unless paid a much larger premium than 10*s.* per cent.

(*a*) 10 Barn. & Cress 527.

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His lordship left it to the jury to say, whether the proper construction of the letter of the 24th January conveyed to the broker a direction to procure the alteration of the policies so as to obtain leave for the vessel to proceed to any other of the Canary Islands than to Teneriffe; and whether the underwriters would have insured the risk to the other Canaries. A verdict having been found for the defendant—

Mr. Serjeant *Wilde*, in Hilary Term last, moved for a rule nisi for a new trial, on the ground that the witnesses called on the part of the defendant to explain the meaning of the letter of the 24th January, were not admissible.—There are undoubtedly many cases where witnesses have been allowed to be called to state their opinions upon matters of science, or other matters wherein a certain degree of skill or knowledge is requisite. In *Carter* v. *Boehm*, where the evidence of a broker, as to the materiality of certain letters, and the propriety of shewing them to the underwriters at the time of insuring, was received, Lord Mansfield said (*a*): "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere *opinion;* which is not evidence. It is opinion *after* an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness." In *Durrell* v. *Bederley* (*b*), witnesses were called to state their opinion as to the materiality of certain rumours that were in circulation at Jersey, that some French frigates were about the coast; and Lord Chief Justice Gibbs said: "I am of opinion, though I received it with reserve, that the evidence of the underwriters who were

(*a*) 3 Burr. 1918. (*b*) Holt's N. P. C. 288.

called to give their opinion of the materiality of the rumours, and of the effect they would have had upon the premium, is not admissible evidence. Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion: and I think it ought not to be received. It is the province of a jury, and not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike; but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." The evidence offered in the present case is of a very different character from that admitted in *Beckwith* v. *Sydebotham* (*a*). There, upon a question concerning the seaworthiness of a ship, after the evidence of persons who had examined her condition, experienced shipwrights who never saw her were allowed to be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not: and Lord Ellenborough held that this was like examining a physician or surgeon to say whether, upon such and such symptoms, a person whose life was insured could at the time of the insurance have been in a good state of health; and that, where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. What particular facts, if disclosed to an underwriter, would, in the opinion of the witness, as a matter of judgment, make a difference as to the amount of the premium, is admissable evidence (*b*). But here the opinion of the witnesses

(*a*) 1 Camp. 116.

(*b*) Per Mr. Justice Holroyd in *Berthon* v. *Loughman*, 2 Stark. N. P. C. 258. Upon the general question whether a witness may be asked whether in his judgment the risk would be increased, and consequently the value of the indemnity enhanced, by particular circumstances, it is to be observed that the price and value must usually be a matter of

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related only to the construction of a letter, a matter upon which the jury were as competent to form an opinion as the witnesses themselves. In the late case of *Ramadge* v. *Ryan* (*a*), Lord Chief Justice Tindal says: "It is true that witnesses skilled in any art or science may be allowed to state what in their judgment might be the result of certain facts submitted to their consideration; but they are not allowed to express an opinion on a mere question of fact, with which a jury may be supposed to be equally well acquainted, and on which they might come to an equally sound conclusion."

A rule nisi having been granted—

Mr. Serjeant *Jones*, in Easter Term, shewed cause.—The direction to the jury was right. The action supposes a breach of duty in the broker in not effecting a certain alteration in certain policies of insurance. The allegation in the declaration "that the defendant might and could before the loss have caused and procured the policies to be so respectively altered in manner aforesaid, by and with the consent of the assurers, if he the defendant had endeavoured so to do, or had used due and proper care and diligence in the premises," which was of the essence of the complaint, was not proved. The question what, under the circumstances, was the duty of the defendant, was for the jury to decide; and they might either be guided by their own knowledge on the subject, or by the opinions of persons

calculation, depending on the probability of loss, and calculated upon the average number of losses; and it is a combined matter of skill and experience to ascertain what circumstances ought to be taken into the account, for the purpose of estimating the probability of loss, and the value of an insurance, under particular circumstances, estimated upon an average. It is therefore difficult to say that the question of value in such a case is not one which requires the judgment of experienced and skilful persons. Starkie on Evidence, Part 4, p. 1176, n.

(*a*) Ante, Vol. 2, p. 421; S. C. 9 Bing. 333.

acquainted with the course of business, and by the understanding of persons in the defendant's way of business. In the case of a surgeon, whether he has used the necessary degree of skill in the performance of an operation, or has been grossly negligent, is a question of fact for the jury, receiving lights from persons who are conversant with the science of surgery. [Mr. Justice *Alderson*.—Calling in an expert and asking him what he would have done under certain circumstances, is very different from calling him to say whether a particular line of conduct was negligent or not.] The evidence offered in this case was unobjectionable unless the rule of law excludes all evidence as to what a person in a particular business or profession ought, under given circumstances, to have done. The case of *Durrell* v. *Bederley* has been cited to shew that such evidence is to be confined to mere opinions upon subjects of science. That decision, however, would require to be well considered before it is now acted upon. Besides, that was a question essentially different from the present. It may be admitted that a question as to what the witnesses would themselves have done under given circumstances might be objectionable. In *Lindenau* v. *Desborough* (*a*), it was held that it is the duty of a party effecting an insurance on life or property, to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance; and that it is a question for the jury whether any particular fact was or was not material. In *Rickards* v. *Murdock*, Lord Tenterden said (*b*): "I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry. If such evidence is rejected, the Court and jury must decide the point according to their own judgment unassisted by that of others." In *Gabay* v. *Lloyd* (*c*) similar evidence was

(*a*) 8 Barn. & Cress. 586. (*b*) 10 Barn. & Cress. 540.
(*c*) 3 Barn. & Cress. 793.

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admitted. And in *Smith* v. *Wilson* (*a*), in a lease, inter alia, of a rabbit warren, the lessee covenanted that, at the expiration of the term, he would leave in the warren ten thousand rabbits, the lessor paying for them 60*l.* per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, it was held that parol evidence was admissible to shew that, by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *twelve hundred*.

Mr. Serjeant *Wilde*, in support of his rule.—The only question in this case was what information the letter of the 24th January was calculated to communicate to the defendant. This was not a question depending upon any particular knowledge of trade. There was no reason for supposing the witnesses to be better able to construe the letter than the Judge or the jury. Besides, they were assuming to give a meaning of their own to the language of a man out of the pale of their profession. The evidence of scientific persons is received only as applicable to an admitted state of facts. In the case of a vessel being run down at sea, persons skilled in seamanship are called; the two vessels are supposed to be in a given situation, and then the witness is asked what was the proper course for either vessel to take. So, in the case of a surgeon, an agreed state of facts is presented to him before he is asked for the application of his science. But here the case is different: the letter requires no explanation; it expressly points at Canary as a market for linens.—The learned Serjeant then proceeded to comment upon the several authorities cited on obtaining the rule nisi; as also upon *Gabay* v. *Lloyd* and *Smith* v. *Wilson*, which he contended had no bearing upon the point under discussion.

Cur. adv. vult.

(*a*) 3 Barn & Adol. 728.

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action of assumpsit brought against the defendant to recover a compensation for the want of proper care and skill in the execution of his duty as a policy broker, that is to say, in not having procured the proper alterations to be made in certain policies of insurance, according to the instructions which he had received, by reason whereof, after a total loss, the underwriters could not be made responsible on the policies, upon the ground of deviation. At the trial of the cause before me at Guildhall, it appeared upon the evidence that the defendant had been employed as a policy broker by Richardson, the bankrupt, before his bankruptcy, and in that character had caused to be effected five different policies of assurance on goods of the bankrupt on board the Sprightly, in which the voyage was described "at and from London to St. Thomas's, with leave to call at Madeira and Teneriffe." On the 16th of February, 1831, the bankrupt received a letter from his supercargo on board the Sprightly then being at Funchal, in Madeira, and dated the 24th of January, which letter the bankrupt immediately took to the defendant, telling him "that the voyage was altered, and that he left him this letter, to do the needful with it." The defendant accordingly, within a week after, caused alterations to be made by the several underwriters on the respective policies, by adding leave from the underwriters that the Sprightly might proceed to St. Kitt's $\frac{\text{and}}{\text{or}}$ Barbadoes for all purposes. There were some slight variations in the terms of the alteration in the different policies, not material to the present inquiry. The vessel was lost at the island of Grand Canary, to which she had afterwards sailed: and, actions having been brought which turned out unsuccessful by reason of the voyage on which the ship was lost not being covered by the alteration, the assignees brought the present action against the defendant

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for the nonperformance of the duty which he had contracted to perform as policy broker; contending that, under the letter of the 24th of January, 1831, which formed his instructions for the alteration of the policies, it was the defendant's duty to have included in such alteration "liberty to proceed to or touch at any of the Canary Islands." After the plaintiffs had closed their case, the defendant's counsel called several policy brokers; and, putting the five policies, and the bills of lading and invoices of the goods, and also the letter of the 24th of January, 1831, into their hands, the witnesses were asked what alteration of the policies ought a skilful insurance broker to have procured, in the judgment of the witnesses, having these documents in his possession, and being instructed to do the needful. To this question they replied, in substance, that they thought a policy broker would have done ample justice to the instructions by procuring the alteration as made. The case went to the jury, who found their verdict for the defendant; and, upon a rule granted to set aside this verdict, the question argued before us has been, whether such evidence was admissible. It is objected on the part of the plaintiffs, that, to allow this question to be put to the witnesses is in effect and substance to allow them to be asked what is the meaning of the letter; that it is to ask them whether the letter told the defendant that the vessel was going to the Canaries; whereas the letter ought to be allowed to speak for itself; or, if there was any doubt upon the meaning, it ought to be determined by the Court and jury, and not by the evidence of insurance brokers or of any other witnesses. It may be admitted, that, if such were the real state of the question, the evidence offered would have been inadmissible. But we think, upon reference to the issue between the parties, it was very different. The action is brought for the want of reasonable and proper care, skill, and judgment shewn by the defendant under certain circumstances

in the exercise of his employment as a policy broker. The point therefore to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper measure of care, skill, and judgment. This is a question of fact the decision of which appears to us to rest upon this further inquiry, viz. whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant did: for, the defendant did not contract that he would bring to the performance of his duty on this occasion an extraordinary degree of skill, but only a reasonable and ordinary proportion of it, and it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to shew by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as did the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour. And there is no hardship put upon the plaintiffs by this course of proceeding; for, they might have called members of the same profession or trade to give opposite evidence, if the facts would have warranted it; and the jury would then have decided upon such conflicting testimony, according to the relative skill or experience of the witnesses on either side, or according to the strength of the reasons which were advanced by the witnesses in support of their respective opinions. If this is the point to be decided, as we all think it is, neither the Judge nor the jury can, upon reading the letter, arrive at any conclusion upon the question. If the letter, indeed, had contained an express or explicit order to obtain leave to touch

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at the Canaries, there would have been no question at all: evidence as to the conduct of other men on reading such a letter would never have been received, because perfectly useless if received. But it is not a simple abstract question, as is supposed by the plaintiffs, what the words of the letter mean. It is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is performed; the nature of the cargo on board; the objects of the voyage as disclosed in the letter; above all, the circumstance that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands; would all operate in the minds of experienced men in determining whether it was intended the alteration should include a liberty to touch and stay at the Canaries in general. And this conclusion, it appears to us, neither Judge nor jury could arrive at from the simple perusal of the letter unassisted by evidence; because they would not have the experience upon which a judgment could be formed. The decision in this case appears to us to be consistent with the principle laid down by Mr. Justice Holroyd, in *Berthon* v. *Loughman*, that a witness conversant in the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium; a principle which has been confirmed by the later case of *Richards* v. *Murdock*; and it is difficult to reconcile the opinion given by Lord Chief Justice Gibbs, in the case of *Durrell* v. *Bederley* with the judgment of the Court of King's Bench in the case last above referred to.

We think, therefore, both on principle and on the authority of the decided cases, the evidence was properly admitted.

Rule discharged.

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Tuesday, May 28th.

PLEVIN and two Others *v.* HENSHALL and three Others.

In trover for goods, the plaintiffs obtained a verdict for the value. The landlord of the premises on which the goods were, afterwards destrained for rent which became due before the defendants took possession of the goods. The defendants having paid the rent—The Court ordered that the sum so paid should be deducted from the amount of the verdict, and the execution restrained to the residue.

THIS was an action of trover, and brought to recover the value of certain goods alleged to have been improperly taken possession of by the defendants, and sold at auction, by their order, on the 13th and 15th of November last.

At the trial, before Mr. Baron Bayley, at the last Assizes at Chester, the plaintiffs claimed the property under a deed of assignment to them from one William Davies, in December, 1832; and it appeared that the defendants took possession by virtue of certain deeds of conveyance and assignment, dated on the 11th January, 1833, by which Davies, together with his two brothers, conveyed and assigned to the defendants all their joint and separate real and personal estate and effects, upon trust, for the benefit of their creditors. It was proved that the property belonged to William Davies alone, and that it was appraised and sold for 947*l.* 13*s.* 6*d.*, for which sum the jury found a verdict for the plaintiffs. At the time the defendants, by virtue of the previous conveyance to them, took Davies's property, they also took possession of certain premises charged and chargeable with rent due from Davies, and which had accrued due prior to their so taking possession, and which amounted to 118*l.*, which the defendants, after the verdict, paid to Davies's landlord, who had distrained for the same. Under these circumstances—

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi on the part of the defendants, that the verdict might be reduced by the amount of the payment so made by them subsequently to the verdict for the rent due in respect of the premises upon which the goods sought to be recovered by this action were situate, and to which rent the

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goods, or some part thereof, were liable.—The learned Serjeant submitted, that, even if the defendants had never interfered with the property, the rent must have been paid to Davies's landlord by the plaintiffs; and that, therefore, the Court would interfere by virtue of their equitable jurisdiction, and direct the verdict to be reduced pro tanto.

Mr. Serjeant *Jones* now shewed cause.—The plaintiffs established their right to the property seized by the defendants, which amounted in value to the sum found by the jury. The application is of a novel nature, and made to favour the defendants, who are clearly wrongdoers, as the jury have found the property in Davies's estate and effects to be in the plaintiffs, by the previous conveyance to them. There can be no set-off in an action of trover; and this application is in effect that a set-off may be allowed. As the defendants took possession of the goods and held them wrongfully, they must be responsible for any liabilities that might have been incurred during the time they so held them: and the payment of the rent due to the landlord could not be made the subject of an action for money paid to the plaintiffs' use. The defendants' remedy, therefore, is by an application to a Court of equity, particularly as the claim could not have been insisted on at the trial; and, the jury by their verdict having found the value of Davies's property converted by the defendants to amount to a certain sum, such verdict is conclusive, and cannot be reduced.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears to me to be quite clear that we may direct the execution against the defendants to be restrained to a smaller sum than the da-

mages found by the jury; and the case falls within the principle which has been long and frequently acted upon in all the Courts in Westminster-Hall, namely, that, after a plaintiff has recovered damages to a certain amount in an action of tort, and the defendant has in effect paid or satisfied part of the debt, the damages may be reduced pro tanto, provided the payment be made before execution is sued out. Here the rent due to the landlord from the party under whom the plaintiffs claimed, was paid by the defendants, and would, in any event, have been recoverable by the landlord from the plaintiffs, the rent having accrued due from Davies, the tenant, prior to the defendants' taking possession of the premises. As, then, the rent was paid by the defendants, and the plaintiffs must have paid it, where is the difference, if the plaintiffs had sold the goods and cattle to satisfy the rent so due, or the landlord had seized and sold them? Whether they were the property of the defendants or not at the time the landlord entered and distrained, appears to me to be immaterial, as they were taken to satisfy a demand for rent for which either party was clearly liable. It therefore amounts to the same thing as if the rent had been demanded and paid by the plaintiffs themselves. It has been said that we shall assume a new jurisdiction if we accede to the defendants' application; but it seems to me that this case may be assimilated to an audita querela, the principle of which is, that, if a defendant has satisfied part of the debt or damages found to be due to the plaintiff, after verdict, and before execution has been sued out, he is not, as the writ expresses it, to be grievously injured. So, where a defendant has paid part of the sum awarded by judgment or ascertained by verdict, and is afterwards taken in execution for the whole, he is entitled to relief pro tanto. In *Ognel* v. *Randal* (*a*), where audita querela was brought,

(*a*) Cro. Jac. 29.

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to avoid execution of a judgment, and it was surmised that after the judgment the defendant had paid the entire sum, the Court held that it was a good surmise; whereupon the defendant was admitted to bail. So, in *Alford* v. *Tatnel* (*a*), where judgment was obtained against two defendants, and one escaped and the other satisfied the debt, it was held that he was entitled to be relieved by audita querela, That mode of proceeding, however, is now discontinued, and a party has his remedy by a summary application to the Court upon motion. As, then, the defendants paid the rent due to Davies's landlord, for which the plaintiffs were liable at all events, I think that, in justice, and upon principle, the defendants are entitled to claim a reduction of the damages found by the jury, to the amount of the rent paid, namely, 118*l.*, and that the execution must be restrained accordingly.

The rest of the Court concurring, the rule to restrain the execution to 829*l.* 13s. 6d. was ordered to be made absolute, on the defendants' paying the costs occasioned by this application.

Rule absolute (*b*).

(*a*) 2 Mod. 49.

(*b*) See 2 Wms. Saund. 148 *a*, n.

Wednesday, May 29th.

BYFIELD v. STREET.

The Court refused to allow an amendment of a copy of a writ of capias delivered to a party on his arrest, which copy differed in the date from the writ itself; but set aside the service, and directed the party to be discharged on entering a common appearance.

A rule was obtained by Mr. Serjeant *Andrews*, on the second day of this term, calling on the plaintiff to shew cause why the service of the writ of capias upon the de-

fendant should not be set aside, and why he should not be discharged out of custody upon entering a common appearance, on the ground that the copy of the writ under which he was arrested, was defective, as it left a blank for the day of the month, and was dated in the 9th year of the reign of his present Majesty. The writ, however, was right, and dated on the 9th day of May, in the third year of the reign of King William 4.

Mr. Serjeant *Wilde* yesterday obtained a rule nisi that the copy of the writ might be amended, when the Court ordered that both rules should be taken together, and, as the defendant was in custody, should be argued this day, when—

Mr. Serjeant *Wilde* appeared to support the amendment. — Although the copy of the writ was irregular, the defendant has not been misled by it, and the practice has been uniform for the Courts to allow process to be amended where there is something to amend by: and here the original writ of capias is right. Amendments have been allowed in writs of execution, as well as on mesne process; and, where the amendment has been applied for before the time has expired for shewing cause against a rule to set aside the writ, the party has had leave to amend without costs. In *Bourchier* v. *Wittle* (*a*), and *Davis* v. *Owen* (*b*), there not being fifteen days between the teste and return of a capias, the Court allowed the teste to be amended. The like amendment was granted in *Carty* v. *Ashley* (*c*); and in *Hunt* v. *Kendrick* (*d*), the return of a testatum capias ad satisfaciendum was amended on payment of costs. In *Atkinson* v. *Newton* (*e*), there were cross motions; one to set aside a fi. fa. for an

(*a*) 1 Hen. Bl 291.
(*b*) 1 Bos. & Pul. 342.
(*c*) 2 Sir Wm. Bl. 915; S. C. 3. Wils. 454.
(*d*) 2 Sir Wm. Bl. 836.
(*e*) 2 Bos. & Pul. 336.

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irregularity in the return, and the other to amend the writ; and the Court allowed the amendment, and it seems without costs. In *Newnham* v. *Law* (*a*), the Court allowed the amount of the sum in a capias ad satisfaciendum to be amended and made to accord with the judgment; and, in *Mackiev. Smith* (*b*), a ca. sa. was amended on payment of costs, because the application was too late. In *Stevenson* v. *Dawes* (*c*), the return of a capias was amended without costs, and a cross motion for cancelling the bail bond discharged. In *Walker* v. *Hawkey* (*d*), the Court allowed the return day of a capias to be amended, after a rule nisi to quash the writ for irregularity, on payment of the costs of the amendment and of the application. In *Stevenson* v. *Castle* (*e*), a writ of ca. sa. varying from the judgment in the sum recovered, was amended, although no previous motion had been made for that purpose. In Tidd's Practice (*f*), all the cases are referred to as to amendments on mesne process and writs of execution; and, although the late statute, 2 Will. 4, c. 39, s. 4, enacts, "that, in all actions wherein it shall be intended to arrest and hold any person to special bail, the process shall be by writ of capias, and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith, shall be delivered therewith to the sheriff or other officer or person to whom the same may be directed, or who may have the execution or return thereof, and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest;" yet, as the defendant had the opportunity of looking at the original writ, which was

(*a*) 5 Term Rep. 577.
(*b*) 4 Taunt. 322.
(*c*) 2 Bos. & Pul. 109.
(*d*) 5 Taunt. 853.
(*e*) 1 Chit. Rep. 349.
(*f*) 9th Edit. 129, 1028.

right, the copy might be amended by it; and the Court will give the statute a liberal construction.

Mr. Serjeant *Andrews*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—It seems to me that this case does not fall within the principle of those cited. We have power to amend a writ, because it is the act of and remains in the custody of the Court. But the copy of a writ is the act of the party, over which the Court has no control, and in this case is in the possession of the defendant by the delivery of the officer who, at the time, arrested the defendant. The late statute, 2 Will. 4, c. 39, s. 4, requires that in all actions wherein it shall be intended to arrest and hold any person to special bail, so many copies of the process as there may be persons intended to be arrested thereon or served therewith shall be delivered therewith to the officer, who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him. This is a statutory regulation which renders an arrest incomplete if the condition thereby required be not complied with, namely, the delivery of the copy of the writ to the party arrested; and here it appears, that that which was delivered to the defendant was not a copy of the writ. It is most important that the copy should be correct, and correspond with the writ in every respect, as the object of the statute was to give a defendant information of the precise nature of the plaintiff's demand against him.

Mr. Justice PARK.—The statute requires that copies of the process shall be delivered to the officer, who shall, upon execution of such process, cause one copy to be delivered to every person upon whom such process shall

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be executed; so that, in the case of two or more defendants, each must have a true copy of the original capias; and that has not been done in the present case.

Mr. Justice BOSANQUET.—The only question is, whether the provisions of the statute 2 Will. 4, c. 39, have been complied with. It is quite clear they have not. The rule, therefore, to set aside the service of the writ of capias, and discharge the defendant out of custody on entering a common appearance, must be made absolute on his undertaking not to bring an action by reason of his arrest; and the rule to amend the copy of the writ must be discharged.

Rules accordingly.

Tuesday, June 4th.

The declaration charged an assault and battery of the plaintiff, and taking him in custody along certain streets, and imprisoning him on a false charge of an assault with intent to commit a felony. Plea, that the plaintiff having assaulted the defendant, the latter gave the former in charge of a peace officer, who took him before a magistrate. All the allegations in the count being proved:—*Held*, that the plea was no sufficient answer.

STAMMERS v. YEARSLEY.

THIS was an action of trespass for an assault and false imprisonment. The first count of the declaration alleged, that the defendant made an assault upon the plaintiff, and beat and pulled him about, and forced and obliged him to go through and along certain public streets at Brighton, to a certain public building there, and caused him to be detained in prison there on a false charge of an assault with intent to commit a felony. The second count was for assaulting the plaintiff, and compelling him to go through certain public streets at Brighton to a building there, and there imprisoning him. The third count was for assaulting the plaintiff, and imprisoning him, and keeping and detaining him in prison for the space

of thirty hours, upon a false and unfounded charge of a breach of the peace: and the fourth count for a common assault. The defendant pleaded, first not guilty to the whole of the declaration, and nine special pleas of justification. The eighth was confined to the assault of the plaintiff and imprisonment in the third count, and a part of the imprisonment in that count alleged, to wit, for the space of ten hours, as to which the defendant pleaded that the plaintiff having assaulted him, the defendant, he gave the plaintiff in charge of a peace officer, to be taken before a magistrate to answer the premises, and to be examined and dealt with according to law; whereupon the officer gently laid hands on the plaintiff, and he was accordingly taken and conveyed before two justices of the peace for examination concerning the premises, and necessarily detained in prison for the period of time in that plea mentioned.

At the trial before Lord Chief Baron Lyndhurst, at the last Assizes for Sussex, it appeared that the plaintiff and defendant resided at Brighton; that the plaintiff had become insolvent, and that the defendant had been appointed his assignee, and had charged him with a fraudulent concealment of part of his property. The plaintiff proved that there was no reasonable ground of suspicion for such a charge, and also the assault and imprisonment alleged in the first count of the declaration.

The defendant proved that the plaintiff having assaulted him in the presence of a peace officer, he gave him, the plaintiff, in charge, and that he was accordingly taken by the officer before two magistrates: upon which it was contended for the defendant, that the eighth plea was an answer to the action, as the plaintiff had only proved one assault and imprisonment; but his lordship doubted whether that plea was a sufficient answer to the first count, as the declaration charged the plaintiff with an intent to commit a felony, of which there was no proof, nor

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even a ground of suspicion; and he directed the jury to find a verdict for the plaintiff on all the issues except the issue on the eighth plea, and for the defendant upon that issue; and he further directed the jury to assess the damages the plaintiff might have sustained, in order to prevent the cause going down again, in case the Court should be of opinion that the eighth plea was not an answer to the action. The jury, accordingly, found a verdict for the plaintiff, damages forty shillings; leave being reserved to the defendant to apply to the Court as to the sufficiency of the eighth plea.

Mr. Serjeant *Stephen*, in the last term, accordingly obtained a rule nisi that the postea might be delivered to the plaintiff, notwithstanding the verdict found for the defendant on the issue on the eighth plea, as that plea was no answer to the whole cause of action as alleged by the plaintiff in the first count of his declaration; for that, although the plaintiff might have been guilty of a breach of the peace by assaulting the defendant in view of the officer, yet that did not justify the subsequent charge.

Mr. Serjeant *Andrews* now shewed cause.—As the plaintiff only proved one assault and imprisonment, the eighth plea is, in substance, an answer to all the counts in the declaration; and, although it professes to answer the third count only, and a part of the imprisonment alleged in that count, yet, as there was but one assault proved, which was the gist of the action, and the plaintiff was proved to have assaulted the defendant in the presence of the officer, the whole of the plaintiff's complaint was answered. The alleged assault and imprisonment of the plaintiff were one and the same transaction; but the gist of the complaint was the imprisonment; and it is immaterial whether such imprisonment took place on a false charge, with intent to commit a felony, as alleged in the first count, or

on a false charge of a breach of the peace, as averred in the third; the defendant not only pleaded the general issue to the whole of the declaration, but proved all the allegations contained in his eighth plea; he is, therefore, entitled to retain the verdict found for him on the issue on that plea, as the imprisonment of the plaintiff was, in substance, the act of the officer. In *Phillips* v. *Howgate* (*a*), where the first count of the declaration stated that the defendant assaulted and imprisoned the plaintiff, and, during such imprisonment, struck and illused him, and the defendant pleaded, by way of justification, that he arrested the plaintiff under legal process, and that he, whilst in custody, having conducted himself in a violent manner, the defendant, to prevent his escape, struck him: it was held that, the latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant; and also that the second count, which omitted the battery, having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, he having proved the trespasses as laid in the first count. But that case is distinguishable, as here there was only one alleged act of trespass for an assault and false imprisonment, whilst there the second count omitted the battery, and the plaintiff proved all the trespasses as laid in the first count.

Mr. Serjeant *Stephen*, in support of his rule.—If the eighth plea had been an answer to the whole of the declaration, the defendant would have been entitled to the verdict found for him upon the issue on that plea. But it is an answer to part of the cause of action only as set forth in the first count, and, if pleaded generally to that count, it would clearly have been ill on demurrer; for, the gist of the complaint in that count is the causing the plaintiff to be

(*a*) 5 Barn. & Ald. 220.

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imprisoned *on an unfounded charge of felony*, which differs most materially from a mere charge of an assault and imprisonment for a breach of the peace; as the former charge is of a far graver nature, and might tend to the total ruin of the defendant's character. Besides, the eighth plea is confined to the third count only; and, as all the allegations in the first, which contained matters of aggravation, were fully proved by the plaintiff, the plea relied on by the defendant is no sufficient answer either in substance or in form to that count. In *Rose* v. *Wilson* (*a*), where the defendant sent for a constable, and charged the plaintiff with a felony, upon which he was detained in custody; it appearing at the trial that the defendant was not justified in making the charge, the plaintiff recovered damages for the imprisonment—and the Court refused to grant a new trial. The case of *Phillips* v. *Howgate* is in point, and in favour of the plaintiff; and it cannot be said that the damages assessed by the jury have reference to the trespass to which the eighth plea applies, viz. the alleged assault in the third count, but to the charge of felony, for which there was no reasonable ground of suspicion, and which charge was the gist of the action as alleged in the first count, and which the defendant has not attempted to justify by his eighth plea, in which he has not even adverted to the ill-treatment of the plaintiff, or the other acts of trespass enumerated in that count. As, therefore, the plaintiff in his first count stated the whole of the injury he received, which has not been fully justified, he is entitled to a general verdict on the merits.

Lord Chief Justice TINDAL.—Whatever the inclination of the Court or of my own mind upon the facts of this case might at first have been, I now think that the whole of the trespasses as alleged in the first count are not covered by the eighth plea. I was not so much struck with the argu-

(*a*) 8 J. B. Moore, 362; S. C. 1 Bing. 353.

ment that there is a distinction between the defendant's causing the plaintiff to be imprisoned on a charge of felony and on a mere charge of assault, as that was matter of aggravation, and, if the defendant could have justified the assault and imprisonment, the motives by which he was influenced are not very material. In *Bennett* v. *Allcock* (*a*), to an action of trespass for breaking and entering the plaintiff's house, and debauching his daughter, per quod servitium amisit, it was held that a licence to enter the house, if pleaded, would have been an answer to the action: and Mr. Justice Buller said: "If the trespass had not been proved, the defendant would have been entitled to a verdict. It is perfectly clear, that a licence to enter cannot be given in evidence under the general issue. The plea of 'not guilty,' only goes to deny the fact of the trespass. Now, as that was proved in fact, the plaintiff was entitled to a verdict: and the only consideration for the jury was as to the question of damages." Here, the plaintiff, in the first count of the declaration, has not only charged the defendant with assaulting him, but with pulling him about and obliging him to go to a certain building, through the public streets, and imprisoning him there on an unfounded charge of felony. The eighth plea is pleaded to the third count only, which is a simple count for an assault and imprisonment for an alleged breach of the peace, omitting all the other trespasses enumerated in the first count; and the plea is also limited to the time in the third count mentioned. The Lord Chief Baron having reported to us that all the alleged trespasses in the first count were proved, we are not at liberty to assume that the trespasses not justified were immaterial, or that the plaintiff has not sustained damage by the charge of an intent to commit a felony: and, as the eighth plea does not affect to cover that charge, I think the verdict for the plaintiff must stand.

(*a*) 2 Term Rep. 166.

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Mr. Justice PARK.—As the Lord Chief Baron has reported to us that the facts alleged in the first count of the declaration were fully proved by the plaintiff, I think he is entitled to retain his verdict. The eighth plea is pleaded to the third count only, and affords no answer to the charge of felony contained in the first; the case is, therefore, in principle the same as *Phillips* v. *Howgate.*

Mr. Justice GASELEE.—The only difficulty in this case arises on the record. If the plaintiff had obtained a verdict on one of the counts of the declaration, it might have been entered accordingly. So, if the Lord Chief Baron had directed it to be confined to one particular count, the plaintiff must have elected on which it should be entered; and, as it has been reported to us that all the allegations in the first count were proved, we must assume that the jury found their verdict on that count; the material charge in which, viz. an intent by the plaintiff to commit a felony, the defendant has not attempted to justify by his eighth plea. It is not material that that plea professes to be an answer only to part of the trespasses complained of, namely, to the period of imprisonment, mentioned in the third count, for, in *Monprivatt* v. *Smith* (*a*), to an action of trespass for breaking and entering the plaintiff's house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours; and it was held, that the plea covered the whole declaration, and that, if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have so alleged by a new assignment. But, here, as the eighth plea does not cover the whole of the trespasses enumerated in the first count, the plaintiff is entitled to the postea.

Mr. Justice BOSANQUET.—I am also of opinion that the

(*a*) 2 Camp. 175.

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plaintiff is entitled to retain his verdict, and have the postea delivered to him, as prayed; as this case falls within the principle established by *Phillips* v. *Howgate*. The plaintiff proved several distinct acts of trespass, as alleged in the first count of his declaration, which were not attempted to be justified or answered by the defendant in his eighth plea. This rule, therefore must be made—

Absolute.

BASSET *v.* DODGIN and two Others.

Wednesday, June 5th.

In an action by the holder against the indorsees of a bill of exchange, who indorsed it for the accommodation of the drawer, the latter proved that he had applied to the plaintiff's step-father to get the bill discounted; that he did so, and gave him, the drawer, 32*l.* minus the amount of the bill, although the discount at 5*l.* per cent. was 1*l.* 19*s.* only:—*Held*, that a conversation between the drawer and the party who discounted the bill was not admissible in evidence on the part of the defendants, it not being shewn that such party was the plaintiff's agent; although the defendants had given the plaintiff notice to prove the consideration he gave for the bill.

THIS was an action by the plaintiff as holder, against the defendants as indorsees of two bills of exchange; the first was dated on the 2nd May, 1831, for 115*l.*, and the second on the 5th May, 1831, for 105*l.* Both bills were drawn by one Taylor, upon and accepted by one Daniel, payable at three months after date to Taylor's order, and indorsed by Taylor to the defendants, and by them to the plaintiff. The defendants pleaded the general issue.

At the trial, before Mr. Justice Alderson, at Guildhall, at the last Sittings in this term, Taylor was called as a witness for the defendants. He stated that the bills were accepted by Daniel, and indorsed by one of the defendants (they being in partnership,) for his, Taylor's, accommodation alone; that neither Daniel nor the defendants had received any consideration for either of the bills; that, after they were accepted and indorsed by the defendants, they were handed back to the witness to raise money upon them; and that he applied to one Jackson, the step-father of the plaintiff, to get them discounted, which he promised to do. It was then proposed to examine Taylor as to what passed between him and Jackson when he gave

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the latter the bills to be discounted; this course, however, was objected to, as it was not shewn that Jackson was the plaintiff's agent. The learned Judge thought the objection to be well founded, and refused to admit evidence of any conversation that took place between Jackson and Taylor upon that occasion. Taylor was then asked what Jackson did with the bills, and what was produced by them; to which he answered, that Jackson took them away and returned in a short time with 188*l.*, being *32l.* less than the amount of the bills, which sum he gave to Taylor: and the witness admitted that the legal discount for the short time the bills had to run would have amounted to 1*l.* 19*s.* only. Taylor was then asked as to what passed between him and Jackson respecting the difference between the amount of the bills and the sum received; but the learned Judge also refused to admit evidence of that conversation, for the reason above stated, viz. that the defendants had not shewn that Jackson was the plaintiff's agent. The defendants then gave in evidence a written notice to the plaintiff requiring him to prove the consideration he gave for the bills, and the person or persons to whom it was given; and it was contended for the defendants; that the testimony of Taylor was sufficient to call upon the plaintiff to shew such consideration. But the learned Judge said that the defendants, if they thought proper, might call Jackson for the purpose of shewing whether or not he had acted as the plaintiff's agent in the transaction; but they declined to do so. The jury found a verdict for the plaintiff for *220l.*, the amount of the bills.

Mr. Serjeant *Jones* now applied for a rule nisi that this verdict might be set aside and a new trial had, on the grounds of the rejection of part of Taylor's evidence, which ought to have been received; and that, under the circumstances, the defendants had offered sufficient evidence to call upon the plaintiff to prove the consideration

he had given for the bills.—Taylor stated that the bills had been indorsed by the defendants for his sole accommodation; and that neither they, nor Daniel, the acceptor, had ever received any consideration for them; and, as the plaintiff had due notice to prove the consideration he gave for them, the defendants had a right to inquire into the circumstances under which he became possessed of them. If either he, or Jackson as his agent, had obtained them on an usurious contract, the action could not be maintained; and it must be assumed that, under the circumstances, Jackson was the plaintiff's agent in getting the bills discounted. Although the law presumes that the holder of a bill has given a valuable consideration for it till the contrary be shewn, yet it is merely for the convenience of promoting the circulation of such instruments; and if the plaintiff could not be called upon to prove the consideration in such a case as the present, it would afford a protection to usurers, by enabling them to employ third persons to act for them in taking usurious intent. The defendants were not bound to call Jackson as a witness. If he had been called by the plaintiff, the truth might have been elicited from him on cross-examination. The probability is that he advanced the money on the bills himself, and afterwards handed them over to the plaintiff without any consideration, for the purpose of his suing the defendants upon them in his own name. It is a well-known principle, that, where a reasonable doubt or suspicion arises in the course of evidence, of a want of consideration given for a bill by the party who sues upon it, he is bound to prove such consideration; at all events where any fraud appears on the transaction, as in the present case. In *Rees* v. *The Marquis of Headfort* (*a*), it appearing, in an action by the indorsee of a bill, that a prior party had been defrauded out of it, Lord Ellenbo-

(*a*) 2 Camp. 574.

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rough held that the plaintiff was bound to prove what consideration he gave for it. The same point was determined in *Duncan* v. *Scott* (*a*), where the bill was drawn without consideration and under duress. In *Reynolds* v. *Chettle* (*b*), where the defendant had given the plaintiff notice to prove what consideration he gave for the bill, Lord Ellenborough said: "You must first cast some suspicion upon his title, by shewing that the bill was obtained from the defendant, or some previous holder, by force or by fraud:" and here it is quite clear that the defendants were imposed upon by the drawer; and there can be no doubt but that usury is a species of fraud. No consideration was shewn for the defendants' indorsing the bills, as between themselves and Taylor. In *Paterson* v. *Hardacre* (*c*), where a bill was lost, it was held to be incumbent on the holder, who sued upon it, to prove the consideration upon which he received it. And in Chitty on Bills (*d*), it is said: "In an action by the indorsee of a bill, if it appear that a prior party made it under duress, or *was defrauded of it*, and the plaintiff has previous notice to do so, he must be prepared to prove under what circumstances and for what value he became the holder."

Lord Chief Justice TINDAL.—I think the decision of the learned Judge in calling upon the defendants to produce Jackson as a witness, was a correct decision. The plaintiff being the holder and indorsee is prima facie to be taken to be a holder for valuable consideration; and he cannot be called upon to prove the consideration he gave for the bills until his title to them has been impeached. Now, the ground upon which it is proposed to impeach his title is, that, upon the transfer of the bills, he was guilty of usury. But, in order to call on him to prove a consideration, it is

(*a*) 1 Camp. 100.
(*b*) 2 Camp. 596.
(*c*) 4 Taunt. 115.
(*d*) 5th edit. 511.

not sufficient to shew merely a *suspicion* of usury; the usury itself ought to be clearly proved. Was it proved here? Taylor, the drawer, says that he applied to Jackson to get the bills discounted, and that he received from Jackson 188*l.*, being 32*l.* less than the amount of the bills, although the discount would not have amounted to more than 1*l.* 19*s.* If Jackson had been shewn to be the plaintiff's agent, the evidence would, no doubt, have affected the plaintiff with the usury; but, however we may suspect the agency of Jackson, there certainly was no proof of it. The question as to what will or will not be sufficient to render it necessary for a plaintiff to prove the consideration given for a bill, was much considered in the late case of *Heath* v. *Sansom* (*a*), where three of the learned Judges held, that, where a note or acceptance has been given under such circumstances that the original payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration; though one of the Judges (Mr. Justice J. Parke) confines that rule to cases where the note or bill has been obtained by fraud, or felony, or duress, which throw suspicion on the holder's title. But none of those circumstances apply to the present case, where there is no suspicion as to the original making of the bills, nor as to the mode in which they were obtained from the original parties; but the whole question is limited to a single transaction between the plaintiff and Taylor, viz. whether the bills, after they were in the hands of the defendant, were parted with to the plaintiff upon an usurious consideration. If the plaintiff was guilty of usury, the calling on him to prove the consideration would be useless, for the bills cannot but be void in his hands. The question, therefore, in this case was, not so much whether Basset ought to prove the consideration, as whether the defendants, after they had attempted to prove the usury,

(*a*) 2 Barn. & Adolph. 291.

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and failed in giving complete evidence of it, might call upon the plaintiff to give any evidence to answer such a case; and I am of opinion, that, under such proof, he was not compellable to give any evidence in answer.

Mr. Justice PARK.—I am also of opinion that the learned Judge was right in rejecting evidence as to what passed between Taylor and Jackson on the discount of the bills; the latter not having been shewn to be the plaintiff's agent. He went far enough by allowing Taylor to state the amount he received from Jackson for the bills. Now, Jackson was no party to the bills, and the only ground of suspicion was that he was the step-father of the plaintiff. That was not a sufficient reason to call upon the plaintiff to prove the consideration he gave for the bills; nor was he bound to do so till the defendants had shewn something to throw suspicion or a shade on the transaction. As to the alleged hardship of requiring the defendants to call Jackson as a witness—there are many cases in which a party is unavoidably compelled to go into an enemy's quarters for evidence; for instance, in an action against the sheriff for a false return, where the plaintiff can only fix him by calling the bailiff to prove the warrant, who is frequently the real defendant.

Mr. Justice GASELEE and Mr. Justice BOSANQUET were absent.

Rule refused.

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TAYLOR *v.* LEIGHTON.

Thursday, June 6th.

An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it, that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was alive:—*Held*, sufficient to entitle the plaintiff to enter up judgment.

MR. Serjeant *Wilde* moved for leave to enter up judgment on an old warrant of attorney, upon an affidavit of the plaintiff, that the defendant had not paid to him, the plaintiff, or to any person on his behalf, the sum secured by the warrant of attorney, or any part thereof, but that the same was still due and owing from the defendant to the plaintiff; that the plaintiff was present and saw the defendant execute the warrant of attorney; that the subscribing witness attested the execution in the plaintiff's presence; and that he was at that time his clerk; but that he had left his service about two years ago, and was now, as the plaintiff had been informed, and believed, residing in France; and that the plaintiff saw and conversed with the defendant on the 25th of May last.

THE COURT concurred in thinking that this affidavit was sufficient.

Rule absolute (*a*).

(*a*) See *Constable* and Another v. *Wren*, *ante*, 210, n.

ELIZABETH ASPINALL and Others, Executrix and Executors of JOHN ASPINALL, deceased, *v.* WAKE and two Others.

Thursday, June 6th.

Where executors continued to carry on the testator's business, and drew bills *as executors* for goods sold to the defendants, several of which bills the defendants accepted and paid:—*Held*, that the plaintiffs might sue as executors for the price of such goods.

THIS was an action of assumpsit for goods sold and delivered. The declaration contained two sets of counts; the first on promises made by the defendants to the testator in his lifetime; the second on promises to the plain-

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tiffs, as executors, for goods sold by them as such executors since the testator's death.

At the trial before Lord Chief Justice Tindal, at Guildhall, at the Sittings after the last term, it appeared that the testator resided near Halifax, where he had extensive stone quarries, some of which were leasehold, and that he was in the habit of shipping large quantities of stone to the defendants in London; that, at the time of his death, which took place in the beginning of April, 1830, two hundred tons of stone were lying on the wharf, ready for shipment, some of which the plaintiffs shortly afterwards caused to be shipped for the defendants; and that the plaintiffs continued the business, and quarried stone, and shipped other cargoes on the defendants' account for some months after the testator's death. Several accounts and letters between the plaintiffs and defendants were put in and read, relating to contracts for stone quarried and shipped after the testator's decease; in some of which letters, the plaintiffs described themselves as Elizabeth Aspinall & Co., and in one as Elizabeth Aspinall & Co., Executors of John Aspinall, deceased; and, from the time of the testator's death to December, 1831, the plaintiffs drew bills on the defendants by the style and description of Elizabeth Aspinall, for self and co-executors of the late John Aspinall, which bills the defendants accepted, and several of which they paid. For the defendants, it was contended that the plaintiffs could not recover in this action, as they had, since Aspinall's death, been carrying on business on their own account, and not as executors; and therefore that the declaration was ill for misjoinder; and that there was no sufficient proof that the plaintiffs had dealt with the defendants *as executors*, to support the allegations in the second set of counts. His Lordship, however, refused to nonsuit the plaintiffs, considering that the words *as executors* might be rejected as surplusage, on the authority of *Hornsey* v. *Dymocke* (*a*).

(*a*) 1 Vent. 119.

The jury found that there was no evidence of any existing contract between the defendants and the testator, and that the accounts between them had been settled and closed, and that a sum remained due from the defendants to the plaintiffs for stones quarried and supplied by the latter after Aspinall's death. A verdict was accordingly entered for the plaintiffs on the second set of counts, with damages to the amount of the stone delivered: leave being reserved to the defendants to move that it might be set aside, and a verdict entered for them, in case the Court should be of opinion that the objections taken at the trial were well founded.

Mr. Serjeant *Taddy*, on a former day in this term, accordingly obtained a rule nisi, on the grounds—first, that the words "as executors" in the second set of counts could not be rejected—secondly, that the plaintiffs could not be entitled to recover in their character of executors, as there was no evidence to shew that they dealt as such with the defendants in respect of the stone quarried and supplied by them since Aspinall's death.—It is clear that a plaintiff cannot join in the same declaration a cause of action accruing to him in his character of executor with another which accrues in his own right; and, if he name himself executor when he need not do so, and fails, he must pay costs—per Mr. Justice Buller, in *Cockerill* v. *Kynaston* (*a*). The Court will consider whether the sum recovered by the verdict will be assets in the hands of the plaintiffs. If not, it is quite clear that they could not be entitled to sue as executors; and, as they quarried stone on their own account after the death of Aspinall, they should have sued the defendants for the quantities so supplied in their own right.

Mr. Serjeant *Wilde* now shewed cause.—The plaintiffs' testator, as owner of the quarries, supplied the defendants

(*a*) 4 Term Rep. 280.

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with stone down to the time of his death. The plaintiffs, as his executors, carried on the business afterwards, and the defendants paid them the balance due to their testator, and closed the accounts; and, as the jury have confined their verdict to the second set of counts, the first is out of the question. Formerly, there was a difficulty as to what executors could recover on counts describing them as such, and there were several conflicting decisions, till the case of *Cowell* v. *Watts* (*a*) established the rule that a count upon a promise to the plaintiff *as administratrix*, for goods sold and delivered by her after the death of the intestate, might be joined with a count upon an account stated with her *as administratrix*, on the ground that the damages and costs when recovered would be assets in her hands; and that rule was acted upon in the late case of *Marshall* v. *Broadhurst* (*b*). In *Betts* v. *Mitchell* (*c*), which was cited and confirmed by Mr. Justice Chambre, in *Hosier* v. *Lord Arundel* (*d*), the plaintiff declared upon several promises made to his testator, and also on a promissory note made to himself *as executor*, and the Court thought that the last count could not be joined with the former ones, the words "as executor" being only a description of the plaintiff's person, whereas the note was made to him, and transferable by his indorsement, and would go to his administrator, and not to the administrator de bonis non. That case, however, as well as *Hosier* v. *Lord Arundel*, was decided before the principle as to assets was established in *Cowell* v. *Watts*. In *King* v. *Thom* (*e*), where the payee of a bill indorsed it to two persons as executors, and it was held that they might declare as such in an action against the acceptor. And in *Crawford* v. *Whittal* (*f*), it was held that a person who sues as executor, when he might sue in

(*a*) 6 East, 405.
(*b*) 1 Cromp. & Jerv. 403.
(*c*) 10 Mod. 316.
(*d*) 3 Bos. & Pul. 11.
(*e*) 1 Term Rep. 487.
(*f*) 1 Doug. 4.

his own right, need not make profert of the will. Here, although the plaintiffs might have maintained an action in their own names, yet the defendants contracted with them as executors, and they are therefore entitled to recover in that character. The Court will look at the nature of the plaintiffs' demand; and, although they have described themselves as executors in the last set of counts, it is immaterial; and, even if it be otherwise, they adduced sufficient evidence to shew that the defendants dealt with them in their character of executors, as all the bills were drawn by them as such, and which the defendants accepted and paid; and they styled themselves as executors in one of their letters written shortly after the testator's death, to which the defendants made no objection, but afterwards recognized them in that character; and, there can be no doubt but that the sum recovered by the verdict will be assets in their hands as executors.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Jones*, in support of the rule.—The several demands of the plaintiffs for goods sold by their testator, and by themselves as his executors, cannot be joined in the same declaration; and the words "as executors," in the last set of counts, form a material description, and cannot be rejected as surplusage. It has never been decided that executors may carry on trade on their own account, and yet describe themselves *as executors* on such a trading. Where the contract has been entered into by the testator, the executors may sue as such; but they cannot continue to trade on their own account, and describe themselves as executors. The rule now established is, that, where the sum recovered will be assets in the hands of an executor or administrator, he may sue in his representative character, and describe himself accordingly. But here, the greater part of the stone supplied to the defendants was quarried and shipped by

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the plaintiffs after the testator's death. The creditors of his estate, therefore, could not be entitled to the amount due for them; neither could it be appropriated in discharge of the debts due from his estate; and consequently it could not be assets in the hands of the plaintiffs as executors. There was, therefore, a material variance between the evidence adduced by the plaintiffs and the declaration, as they continued to deal with the defendants on their own account after Aspinall's death. The plaintiffs were not bound by any contract of their testator to supply stone after his death; and they distinctly described themselves as executors, and the character and capacity in which they dealt with the defendants is most material. *Cowell* v. *Watts* is the first case in which the Court departed from the antient course; and *Hornsey* v. *Dymocke* is distinguishable from the present, as there the plaintiff, as administrator, declared in assumpsit, that he had formerly deposited a certain sum in the defendant's hands for the intestate's use, in consideration whereof the defendant promised the plaintiff that he would pay it to the intestate, or, if she died before she attained the age of eighteen, he would pay it to her executors; and the plaintiff proved that the intestate died before she was eighteen; and it was moved in arrest of judgment, that the plaintiff ought to have brought the action in his own right, as the promise was made to him: but the Court said, that, as the intestate might have brought assumpsit, because she was the party to whom the money was to be paid, the action was good either way. And in *Cowell* v. *Watts*, Mr. Justice Le Blanc said (*a*): "I see no reason why the promises in the two first counts may not be laid as made to the wife as administratrix, consistent with the truth of the case. As, suppose the defendant had contracted in writing, that, in consideration that the plaintiff would sell to him certain goods which

(*a*) 6 East, 413.

had belonged to the intestate, and promised that he would pay her for them as administratrix; and so, with respect to the last count, the defendant may have accounted with the plaintiffs, or with the auctioneer, for the price of the same goods, and upon such accounting, knowing in what right the goods were sold, he may have promised to pay her for them as administratrix. Therefore, where all the promises are laid to have been made to her in her representative character, and where the damages and costs when recovered are to be in the course of administration, I think those counts may be joined." Here, however, the damages recovered by the plaintiffs are not assets in their hands as executors, as belonging to the testator's estate. In *Ord* v. *Fenwick*, Lord Ellenborough said (*a*): "If we can suppose a case where the money must have been paid by a person as executrix, and for which she must entitle herself to recover as such, the judgment may be sustained. Now, there is one such case, and one only, which occurs to me, namely, where the executrix has been sued on the obligation of her testator, who had become surety for the defendant, whose debt she has been obliged to pay; to recover which the law would raise an implied promise by the defendant to her, as executrix, to repay the money." In Buller's Nisi Prius (*b*) it is said: "An executor brought an action for rent due to his testator in his life time, and for other rent due in his own time, and there was another count on a quantum meruit for the rent of another messuage, in which he had not declared as executor: after judgment by default, and a writ of inquiry executed, upon error brought, judgment was reversed, because the demands were incompatible." The Court will look at the real contract between the plaintiffs and defendants subsequent to Aspinall's death: and it is quite clear that it was made by the plaintiffs in their own

(*a*) 3 East, 109. (*b*) 7th edit., by Bridgman, 138 a.

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right, and not in their representative character; and, if the words "as executors" may be rejected, it will materially alter the situation of the defendants, both as to costs and their right of set-off. Every order by them for stone quarried after the death of the testator, was a new contract, and made with the plaintiffs in proprio et non alieno jure; and a contract which is exclusively personal cannot be converted by a party suing upon it into a contract made by him in a representative character, and an allegation of such character cannot be rejected as surplusage; and, even if it could be in this case, still there is a fatal variance between the evidence and the declaration.

Lord Chief Justice TINDAL.—The question as to misjoinder cannot be raised in the case now before us; for, the jury having found a verdict with damages for the plaintiffs on the second set of counts only, the effect is the same as if the action had been brought on that set alone, namely, as if the declaration had been confined to the counts for goods sold and delivered to the defendants by the plaintiffs, as executors, and promises by the defendants to pay them as such. At the trial, I was called upon to nonsuit the plaintiffs, before the defendants' case was opened, on the ground that the evidence adduced for the plaintiffs did not support the allegation in the second set of counts, that the plaintiffs had delivered the goods in their capacity of executors, or that they had dealt with the defendants as such; but, on the recollection of the case of *Hornsey* v. *Dymocke*, I thought that the words "*as executors*" were immaterial, and might be rejected; and the case ultimately went to the jury, who found a verdict for the plaintiffs on the evidence before them, upon the second set of counts. The question was not left to them on a mere limited point; and we are now, therefore, at liberty to look at the general effect of the evidence on both sides, to see whether there is any variance between the proof offered

by the plaintiffs and the allegation in the second set of counts as to a dealing by them in the character of executors; and I think there was sufficient evidence to establish their right to sue as such. Before the death of the testator, the defendants dealt with him for stone dug and supplied from his own quarries: upon his death, the plaintiffs, who were appointed his executors, continued to carry on the business on the same premises, and still continue to do so. Although it is possible that they might have carried on the business on their own account, still the probability is that they carried it on as executors; at all events, it is not inconsistent to suppose that they did so. In point of fact, according to some of the evidence adduced, the business was carried on by them *as executors;* and, after the death of the testator, they continued to quarry and ship stone as before. It appeared that part of the quarries were leasehold property, and therefore could only have been possessed by the plaintiffs to be administered by them in due course, in their capacity of executors. Although, therefore, they might have purchased some stone from others, yet the contracts for the supplies to the defendants were primarily for the benefit of the testator's estate; and the plaintiffs did not lose sight of the character in which such contracts were made, and brought their action accordingly. Besides, the defendants themselves treated the contracts as having been made with the plaintiffs as executors; and, having so done, they cannot now say that the description was improper. The plaintiffs, in one of their letters, described themselves as executors, and no objection was taken to it by the defendants in their answer; and, from the time of the testator's death to the last payment made by the defendants, the uniform course of such payments was by bills of exchange drawn by the plaintiffs as executors, and accepted by the defendants. Now, let us pause here for a moment. If one of those bills had been dishonoured, and remained un-

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paid by the defendants, and the plaintiffs had sued them upon it, it is quite clear that they might have declared as executors, according to the case of *King* v. *Thom* (*a*), which is an authority expressly in point, and where it was decided, that, where the payee of a bill indorses it to persons *as executors*, they may declare as such in an action against the acceptor. As, therefore, the plaintiffs might have sued as executors on the bills given by the defendants in payment for the stone supplied, it seems to me to be a capricious objection to say, that, if they were driven to their original contract, they might not sue in that character upon the consideration for which the bills were given. In the case to which I have referred, Mr. Justice Buller says: "There can be no such inconvenience as has been suggested, from the executors' indorsing the bill, for it is immaterial whether they indorse it as executors or not." But it has been said that an inconvenience will arise in this case with respect to costs. The same objection, however, was made and answered in *Cowell* v. *Watts* (*b*), where the Court said that it made no difference, as the damages and costs, when recovered, would be assets. Now, we must go the length of over-ruling those two cases, unless we hold that the present plaintiffs are entitled to sue as executors. It has been further objected for the defendants, that, if the present action can be sustained in this shape, it will make a material difference in the right of set-off; but I think such an objection ought not to prevail as an answer to the plaintiffs' claim. We must decide on the law as it existed before the passing of the statute 5 Geo. 2, c. 30; for, the question in this case is, whether there is a variance between the proof adduced by the plaintiffs and the allegations in the second set of counts, that the promises were made to them *as executors:* and the law of set-off does not alter the rules of evidence in

(*a*) 1 Term Rep. 487. (*b*) 6 East, 405.

this respect. However, I do not feel the weight of this objection; although the plaintiffs may sue in their representative character of executors for a cause of action accruing since the death of their testator, yet the defendants may treat it as a personal contract, on which the plaintiffs are personally liable to the costs; for, as Mr. Justice Buller said in *King* v. *Thom*: "If they indorse the bill, they are liable personally, not as executors, for the indorsement would not give an action against the effects of the testator." And in *Childs* v. *Manins* (*a*), it was held that a promissory note by which the makers, *as executors*, severally and jointly promised to pay on demand, with interest, rendered them personally liable. Therefore, although the plaintiffs in this case have described themselves as executors in the declaration, and sue as such, yet, as the cause of action has arisen since the death of their testator, the defendants might treat it as a personal contract and look to them for costs. However, without reference to the questions of costs or set-off, upon the merits of this case I think the plaintiffs are entitled to recover; and therefore that the verdict found for them on the second set of counts must stand. It becomes unnecessary to express any opinion as to the rejection of the words "*as executors*," although it seems to me that the case in Ventris is an authority expressly in point.

Mr. Justice PARK.—I am of the same opinion. In the first place, we must look at the nature of the commodity sold by the plaintiffs to the defendants. The facts that a large quantity of stone was lying on the wharf ready for shipment at the time of the testator's death, that other stone was brought there and shipped afterwards, and that part of the quarries were leasehold property, are sufficient to entitle the plaintiffs to sue in their character of

(*a*) 5 J. B. Moore, 282; S. C. 2 Brod. & Bing. 460.

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executors, as the article supplied by the plaintiffs to the defendants were to be used beneficially for the testator's estate. They were bound to sell the stone on the wharf, at all events, for the benefit of the estate; and representatives of a deceased, in carrying on his business, with a view of winding up his affairs, are frequently obliged, to a certain extent, to introduce new materials, as occasion may require; as in the case of a deceased bookseller in London, it would be necessary to keep up his stock for the benefit of his estate; but, by so doing, it cannot be said that the representatives are carrying on business on their own account.

It is quite clear that the plaintiffs, as executors, were not bound to sell the quarries that were leasehold immediately on the death of the testator, but might continue to work them for the benefit of the estate; and, therefore, a part of the sum recovered in this action would, at all events, be assets in their hands. It appears to me that the cases of *Cowell* v. *Watts* and *King* v. *Thom* go the whole length of the present; and in *Dowbiggin* v. *Harrison*, Lord Tenterden said (*a*): "Suppose that goods belonging to the intestate had been sold by the plaintiff to the defendant after the death of the intestate; she might sue as administratrix for the price of the goods." I am not sorry to come to this conclusion; and I cannot help saying that this appears to me to be a most dishonest defence.

Mr. Justice GASELEE.—I also think that it is not necessary to disturb this verdict, which accords with the justice of the case. If it were necessary to consider the objection as to the character in which the plaintiffs sue, I should pause before I could say that the words "as executors" might be rejected. But I hold it unnecessary to de-

(*a*) 9 Barn. & Cress. 669.

cide that point, as my opinion is founded on the fact that the defendants throughout dealt with the plaintiffs in their character of executors, as was clearly proved by the correspondence and by the uniform mode of payment—the defendants accepting bills drawn upon them by the plaintiffs, as executors.

Mr. Justice BOSANQUET.—I am of the same opinion. It is not necessary for us to consider whether or not the words "as executors" may be rejected, on the authority of the case in Ventris; neither can any question arise on the objection taken at the trial as to the misjoinder, that being set at rest by the finding of the jury. The only point for our consideration then is, whether there is a variance between the evidence adduced by the plaintiffs and the declaration. I think there was sufficient to shew that the contract between the plaintiffs and the defendants was consistent with that declared on, and that the promises were made to the plaintiffs in their representative character of executors, and in the course of the administration of the testator's estate. It is clear that a person may declare as executor, if the property recovered will be assets in his hands: and here the course of dealing between the plaintiffs and defendants clearly shews that part of the sum recovered, at all events, will be assets in the plaintiffs' hands. This rule, therefore, must be—

Discharged.

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Monday, June 11th.

The plaintiff built a wagon for the defendant. The latter employed a smith to affix thereon the iron work, and a tilt-maker to put on a tilt. The wagon remaining in possession of the plaintiff:—*Held*, that the affixing of these articles to it was not a sufficient acceptance of the wagon by the defendant to satisfy the statute of frauds.

MABERLEY *v.* SHEPPARD.

THIS was an action to recover the price of a wagon made by the plaintiff for the defendant. At the trial, before Mr. Justice James Parke, at the last Spring Assizes for Berkshire, the evidence was in substance as follows:—The wagon was made to order; the iron-work was furnished by a smith who was employed and paid by the defendant, and was affixed to the wagon by the smith's men. A tilt also had been put upon the wagon by a person employed for that purpose by the defendant. But the wagon still remained in the possession of the plaintiff. On the part of the defendant, it was contended that, there being no memorandum or note in writing to satisfy the statute of frauds, nor any delivery of the wagon to or acceptance by the defendant, the action could not be maintained. The learned Judge, yielding to the objection, nonsuited the plaintiff, with leave to enter a verdict for *22l.* 10*s.*, the price agreed upon, if the Court should think that the acts done by the defendant amounted to an acceptance.

Mr. Serjeant *Wilde* accordingly, in Easter Term last, obtained a rule nisi.—He submitted, that, where the buyer of an article attaches to it property of his own, exercises over it acts of ownership, or does any thing in reference to it evidencing an appropriation, he thereby declares his acceptance, and the right passes to him, so that he cannot afterwards repudiate it. He referred to *Chaplin* v. *Rogers* (*a*), where it was held, that, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approba-

(*a*) 1 East, 192.

tion, it was taken away,) was held sufficient to warrant the jury in finding a delivery to and acceptance by the vendee, to take the case out of the statute of frauds; and also to Bacon's Abridgment (*a*), where all the authorities upon the 17th section of the statute of frauds (*b*) are collected together.

Mr. Serjeant *Talfourd*, in the course of the same term, shewed cause.—Nothing has in this case been done amounting to that which the statute of frauds requires, viz. a delivery to and acceptance by the buyer. In *Howe* v *Palmer* (*c*), where a vendee verbally agreed, at a public market, with the agent of the vendor, to purchase twelve bushels of tares (then in the vendor's possession, constituting part of a larger quantity in bulk), to remain in the vendor's possession till called for, and the agent on his return home measured the twelve bushels and set them apart for the vendee: it was held that this did not amount to an acceptance by the latter, so as to take the case out of the 17th section of the statute of frauds. So, in *Tempest* v. *Fitzgerald* (*d*), where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon; and about the expiration of that time A. rode the horse, and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which, he promised to fetch

(*a*) Title "Agreement," (C).

(*b*) 29 Car. 2, c. 3, s. 17. The words of the section are: "No contract for the sale of goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." And see the statute 9 Geo. 4, c. 14, s. 7, by which the provisions of the 29 Car. 2 are extended to executory contracts.

(*c*) 3 Barn. & Ald. 321.

(*d*) 3 Barn. & Ald. 680.

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it away and pay the price; to which B. assented: but the horse died before A. paid the price or took him away: it was held that there was no acceptance of the horse within the meaning of the statute of frauds. "It is said," observed Mr. Justice Holroyd, "that the riding of the horse by the defendant on the 20th September, and the directions then given, may be considered as acts of ownership, and were therefore evidence of an acceptance of the horse; but at that time the defendant had no right to take away the horse. For, admitting, for the sake of argument, that the property had been changed, still there is no evidence to shew that Tempest had ever parted with the possession or control, and, if he had not, he had at all events a lien for the price, and the defendant could not be justified in taking it away until the price were paid." Can it be contended here that the plaintiff had, by reason of any thing that had occurred, lost his lien upon the wagon for the price? In *Hanson* v. *Meyer* (*a*), under a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and fourteen days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him *to weigh and deliver* to the vendee *all* his starch: it was held, that, under this contract, the absolute property in the starch did not vest in the vendee before the *weighing*, which was to precede the delivery, and to ascertain the price; and that, part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name and at the expense of the vendor. The case of *Thompson*

(*a*) 6 East, 614.

v. *Macaroni* (*a*) goes still further. There, goods of the value of 144*l.* were made to order, and remained in the possession of the vendor at the request of the vendee, with the exception of a small part, which the latter took away: and it was held that there was no acceptance of the residue of the goods within the statute. There is nothing in the present case to distinguish it from these authorities.

Mr. Serjeant *Wilde*, in support of his rule.—The only question for consideration is, whether or not the property in the wagon has passed to the defendant: no question of lien can affect the case. [*Per Curiam.*—Certainly not. The right of lien would equally exist where there had been a part delivery.] The principle to be deduced from all the cases is, that, where the vendor has done all that he can to put the goods in a state for delivery, and where nothing remains to be done to ascertain the price, they then become the property of the vendee. In *Rugg* v. *Minet* (*b*), where turpentine in casks was sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days, on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to guage them; but before he could fill up the rest a fire consumed the whole in the

(*a*) 3 Barn. & Cress. 1. (*b*) 11 East, 210.

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warehouse within the thirty days: it was held that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for, it was the business of the buyers to get them guaged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the guaging, must be taken to have been done as agent for the buyers, whose concern the guaging was; but that the property in the casks not filled up remained in the sellers, at whose risk they continued. Here, the affixing the iron-work and the tilt to the wagon amounted to an acceptance: upon no other footing could the defendant have a right to affix them. In *Hodgson* v. *Le Bret* (*a*), it was held, that, if the purchaser of goods, at the time of the sale, write his name upon a particular article, with intent to denote that he has purchased it, and to appropriate it to his own use, this is enough to take the sale, as to the article written upon, out of the statute. In *Rohde* v. *Thwaites* (*b*), A. having in his warehouse a quantity of sugar in bulk, more than sufficient to fill twenty hogsheads, agreed to sell twenty hogsheads to B., but there was no note in writing of the contract sufficient to satisfy the statute of frauds. Four hogsheads were delivered to and accepted by B. A. filled up and appropriated to B. sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. B. said he would take them as soon as he could. It was held, that, the appropriation having been made by A. and assented to by B., the property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by A. under a count for goods bargained and sold. Here the evidence went much further: a part of the defendant's property was inseparably attached to

(*a*) 1 Cowp. 233. (*b*) 6 Barn. & Cress. 388.

the wagon. In *Tempest* v. *Fitzgerald*, the fact of the vendor having ridden the horse was held not to be conclusive evidence of an acceptance: in such cases, it is always a question whether there was an intention to deliver or to accept. Suppose there the defendant, instead of merely riding the horse, had sent his farrier to shoe it; would it then have been contended that such an exercise of ownership did not amount to an acceptance? In *Blenkinsop* v. *Clayton* (*a*), the intent was held to be a question for the jury. The present case goes very far beyond that of *Elmore* v. *Stone* (*b*). Here, the vendee has done something to alter the character of the article, which clearly amounts to an acceptance of it.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question in this case arises upon the 17th section of the statute of frauds, the provisions of which have been extended by the late act of 9 Geo. 4, c. 14, to contracts for the sale of goods, notwithstanding the goods may not at the time of the contract be actually made; andth e question is whether there has been such an acceptance of the wagon by the defendant as to satisfy the statute of frauds. The words of the section above referred to are very precise—that the contract shall not be allowed to be good, "unless the buyer shall accept part of the goods so sold, and actually receive the same." The class of cases on which the plaintiff relies is that in which the buyer has exercised some decisive act of ownership over the commodity sold; as, in the case of *Chaplin* v. *Rogers* (*c*), by sel-

(*a*) 1 J. B. Moore, 328.

(*b*) 1 Taunt. 458. It was there held, that, if a man bargain for the purchase of goods, and desire the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the statute of frauds.

(*c*) 1 East, 192.

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ling part of it to another person; and it is contended that the fact of the iron work used for the wagon having been purchased by the defendant of another person, who assisted the plaintiff's men in putting it up, and charged the defendant for his time, is such an act of ownership exercised upon the wagon by an agent of the defendant as brings this case within the principle above referred to. It must be observed, however, that this was not any act done after the wagon was finished and capable of being delivered, but merely whilst it was in progress; and that, after such assistance had been rendered and the iron work fixed, the wagon was left in the plaintiff's yard to be finished by him. If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance. We think the act proved at the trial is by no means so strong and unequivocal as that which took place in *Chaplin* v. *Rogers*, where the purchaser sold part of the hay to a stranger, who actually took it away. Another act which occurred in this case is of a still more doubtful character, viz. the defendant's purchasing a tilt from another person, which was afterwards carried to the plaintiff's, and fixed by his men on the wagon. This would seem to amount to no more than if the defendant had sent a portion of his own materials to be worked up by the plaintiff. And indeed in the case referred to the Court relied much upon the *finding of the jury* that there had been a delivery of the commodity to the purchaser; which finding, they observed, they were not satisfied was wrong. Now, there has been no such finding of the jury in this case.

On the other hand, there are decisions which go the length of holding, that, as long as the vendor retains his right of lien over the whole of the commodity sold, there has been no such delivery and acceptance as the statute

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intended. And again, that, unless there was a delivery of the goods of the vendor with an intention of vesting the right of possession in the vendee, and an actual acceptance of the latter with an intention of taking possession as owner, the statute is not satisfied (*a*); and undoubtedly the present case cannot be held to fall within the compass of either of those decisions; for, the plaintiff retained his lien upon the wagon, and there was nothing in the facts that denoted any intention either to deliver or to accept. The circumstances of this case certainly leave it open to doubt whether the statute has been complied with or not: but we think it is the duty of the plaintiff to free the case from all doubt, and, where any remains, that it is safer to adhere to the plain intelligible words of the statute, which point as clearly as words can to an actual delivery and an actual receiving of part or the whole of the goods sold. Upon this ground we hold that in the present case the requisites of the statute have not been complied with, and that the rule for setting aside the nonsuit and entering a verdict for the plaintiff must be discharged.

Rule discharged.

(*a*) See *Baldey* v. *Parker*, 2 Barn. & Cress. 37, S. C. 3 Dow. & Ryl. 220, and *Phillips* v. *Bistolli*, 2 Barn. & Cress. 511, S. C. 3 Dow. & Ryl. 822.

TWYNING, Demandant; LOWNDES, Tenant.

Thursday, June 6th.

In a writ of right the process was returnable in eight days of St. Hilary; the te-

THIS was a writ of right. The writ of summons was returnable on the 8th January, 1833. On the same day,

nant on that day cast an essoin, and gave the demandant a rule to adjourn it till the 12th April, in Easter Term, a period embracing five returns: the demandant not having adjourned the essoin, the tenant on the 14th January signed judgment of non-pros:—*Held*, that the judgment was irregular, inasmuch as the rule to adjourn gave the demandant a more distant day than the law allowed.

Quære whether it was necessary for the tenant to enter a ne recipiatur with the clerk of the essoins before signing judgment.

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TWYNING Demandant, LOWNDES Tenant.

the tenant cast an essoin, and ruled the demandant to adjourn the essoin: the rule was, that, "unless the demandant adjourns the essoin *to the 12th day of April*, in Easter Term next, let judgment of non-pros be entered." The demandant having omitted to adjourn the essoin, the tenant signed judgment of non-pros on the 14th January.

Mr. Serjeant *Taddy*, on the part of the demandant, in the last term, obtained a rule calling on the tenant to shew cause why this judgment should not be set aside for irregularity.—The rule to adjourn is informal, inasmuch as it embraces five returns instead of four as required by the statute 24 Geo. 2, c. 48, s. 3 (*a*); and the judgment was signed prematurely. The law upon this subject is very amply treated of in a note to the case of *William* v. *Gwyn*,

(*a*) "For the more speedy proceeding in writs of dower unde nihil habet, and writs of entry for common recoveries to be sued and prosecuted by writs of entry, or writs of right of advowson, and in all other real actions," the third section enacts, "That, if any writ in any such action come in and be returnable in his Majesty's Court of Common Pleas in the day of the return of the Morrow of All Souls, then day shall be given in fifteen days of St. Martin; if on the Morrow of St. Martin, then in eight days of St. Hilary; if in eight days of St. Martin, then in fifteen days of St. Hilary; if in fifteen days of St. Martin, then on the Morrow of the Purification; if in eight days of St. Hilary, then in eight days of the Purification; if in fifteen days of St. Hilary, then in fifteen days of Easter; if on the Morrow of the Purification, then in three weeks from the day of Easter; if in eight days of the Purification, then in one month from the day of Easter; if in fifteen days of Easter, then in five weeks from the day of Easter; if in three weeks from the day of Easter, then on the Morrow of the Ascension of our Lord; if in one month from the day of Easter, then on the Morrow of the Holy Trinity; if on the Morrow of the Ascension of our Lord, then in fifteen days of the Holy Trinity; if on the Morrow of the Holy Trinity, then in three weeks from the day of the Holy Trinity; if in eight days of the Holy Trinity, then on the Morrow of All Souls, if in fifteen days of the Holy Trinity, then on the Morrow of St. Martin; if in three weeks of the Holy Trinity, then in eight days of St. Martin."

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where Mr. Serjeant Williams, referring to Booth (*a*), lays down the rule thus (*b*)—"On the fourth day after the return of the writ, the tenant may enter an essoin with the clerk of the essoins, but it must be in person, and not by attorney; the essoin must then be adjourned by the demandant, who will otherwise be non-prossed *if the tenant enters a ne recipiatur with such clerk*, and gives a rule to the demandant to adjourn the essoin. The day of the adjournment of the essoin is to the fourth return, both inclusive, by statute 24 Geo. 2, c. 48." Here, the tenant has neglected to enter a ne recipiatur, without which it seems he could not regularly sign judgment of non-pros.

The learned Serjeant also objected that the essoin was cast in this case on the return day of the writ, instead of on the fourth day after. This point, however, was not pressed, it appearing from the authorities to be pretty clear, that, though the essoin is entered as on the return day, the tenant may wait till the quarto die post.

Mr. Serjeant *Wilde*, on a subsequent day, shewed cause. —The objections taken to the course pursued by the tenant resolve themselves into three—first, that the judgment being signed before the day to which the demandant was required by the rule to adjourn the essoin, was signed too early—secondly, that the rule to adjourn the essoin was erroneous, inasmuch as it covered five returns, instead of four—thirdly, that judgment of non-pros could not properly be signed until the tenant had entered a ne recipiatur.

1. The judgment was signed, not for default of the demandant's appearance on the day to which he was required by the rule to adjourn the essoin, but for not adjourning the essoin. The rule to adjourn was a four day rule, and

(*a*) Booth on Real Actions, p. 92. (*b*) 2 Wms. Saund. 45 *e*, n.

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therefore the tenant had a right to sign judgment on the expiration of the four days.

2. It is said that the rule required the demandant to adjourn the essoin until too distant a day. But that, if so, does not excuse the default of the demandant in not adjourning it at all. The statute 24 Geo. 2, c. 48, s. 3, provides that, if the writ be returnable in eight days of St. Hilary, then day shall be given in eight days of the Purification—giving an absolute direction to adjourn, not for a certain number of returns, but from a certain day to a certain other day: the act does not say that there shall be the intervention of a given number of returns. The antient rule of practice was, that a party should take but one step in a term: and the rule to adjourn the essoin was from term to term (*a*), which is the only intelligible and certain rule on the subject.

3. The ne recipiatur is only available to this extent, viz. to prevent the tenant from casting an essoin after the return day of the writ of summons. [Mr. Justice *Alderson*.—It is for the demandant to enter a ne recipiatur, not the tenant.] Where the tenant is summoned and appears in person, it is in the power of the demandant to cast an essoin: a ne recipiatur would prevent his doing it after the proper time (*b*). That is clearly inapplicable to this case, where the tenant has appeared, an essoin has been cast, and judgment signed. No distinction is taken in the old books between the practice in this respect in real and in personal actions. In Boote's Suit at Law, it is said (*c*): "On the defendant's being summoned, he was to appear, or cast an essoin, that is, send his excuse for his not appearing; and the clerk of the essoins entered such essoin, and after such entry the defendant could not appear again that term, because the

(*a*) Boote's Suit at Law, 6th edit. pp. 129, 131.

(*b*) See Glanville, de Legibus, by Beames, c. 32.

(*c*) 6th edit. p. 129.

plaintiff, by the essoin roll, had the same day given him; and therefore the defendant was not allowed to appear and plead in the plaintiff's absence. This essoin was to be sent on the very day the writ was returnable; for, if the defendant omitted casting an essoin that day, the plaintiff had liberty the next day to enter an exception with the clerk of the essoins, and obtain an order that the defendant's essonium non recipiatur." The next mention that is to be found of a ne recipiatur is in Booth on Real Actions, which is the principal authority relied on on the other side; where it is laid down that the demandant must adjourn the essoin, otherwise he may be nonsuited, if the tenant enter a ne recipiatur with the clerk of the essoins. In Richardson's Practice (*a*), the practice is to casting essoins is similarly stated. And in Roscoe on Real Actions (*b*), it is said, that, "after the essoin is cast, the tenant should give a rule with the clerk of the essoins for the demandant to adjourn the essoin, and, unless it be adjourned accordingly within the time given by the rule, the clerk of the essoins will sign judgment of non-pros." In none of these books is there any thing said of the tenant's entering a ne recipiatur against the demandant. If the demandant had come before the judgment had been signed, he might perhaps have raised the objection that a ne recipiatur was not entered. But now there is nothing whatever for it to operate upon. In *Burghill* v. *The Archbishop of York* (*c*), judgment of non-pros was signed against the demandant for not adjourning the essoin; and that seems to have been assumed to be the proper course.

Mr. Serjeant *Taddy*, in support of his rule.—The ne recipiatur generally spoken of in the books is to prevent the demandant from adjourning the essoin by favour,

(*a*) 5th edit. vol. i. p. 26. (*b*) Page 162.
(*c*) 1 Lord Raym. 79.

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when he has neglected to do it as a matter of right. The tenant cannot sign judgment of non-pros until he has given a rule to adjourn the essoin: the rule to adjourn is general; the ne recipiatur is to fix the time for adjourning the essoin. In Williams's Saunders (*a*), it is said: "If the tenant does not put in his essoin on the fourth day after the return of the writ, the demandant may on the following day enter a ne recipiatur; if however he neglects to do so, the tenant may enter his essoin at any time after, for, it seems, the clerk of the essoins cannot refuse to receive the essoin, unless a ne recipiatur be entered. But, if the tenant do not appear either on the fourth day after the return of the writ, *or on the adjournment day of the essoin, when an essoin has been entered,* the demandant may sue out the writ of grand cape against him." The passage in Booth, adopted by Mr. Serjeant Williams, is not contradicted by any of the authorities cited. The tenant, therefore, not having in the proper mode called upon the demandant to adjourn, the rule being irregular and a nullity, the judgment signed for not obeying that rule is irregular also. The case of *Burghill* v. *The Archbishop of York* is an authority to shew that the demandant cannot be non-prossed on an ill-cast essoin. In *Rowles*, dem., *Bowley*, ten. (*b*), the demandant adjourned the essoin to the *second* instead of the fourth return, and the tenant entered a rule with the clerk of the essoins, that, "unless the demandant adjourned the essoin to the third [quære *fourth*] return, a non-pros would be entered; and, *after the time to which the essoin ought to have been adjourned,* the tenant entered a ne recipiatur, and signed judgment of non-pros, and a writ of grand cape was issued in the action by the demandant on the same day, but shortly after the judgment was signed—the Court set aside the writ for irregularity.

Cur. adv. vult.

(*a*) Vol. 2, p. 45 *f.* (*b*) 1 Moore & Payne, 2.

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Lord Chief Justice TINDAL now delivered the opinion of the Court:—

In this case, the tenant having signed judgment of non-pros in a writ of right, the demandant moved to set the judgment aside for irregularity. It appears that the process by which the tenant was summoned was returnable on the 8th of January last, on which day the tenant entered an essoin at the office of the clerk of the essoins, and on the same day obtained a rule, that, "unless the demandant adjourned the essoin to the 12th day of April, in Easter Term next, let judgment of non-pros be entered;" and, no adjournment having been made by the demandant, the tenant, on the 14th of January, caused judgment of non-pros to be signed. Upon this state of facts the question is, whether such judgment is regular or not.

That it is incumbent on the demandant to adjourn the essoin where the tenant has cast one regularly, and that he is liable to be non-prossed if he neglects to adjourn it, appears from the more antient authorities, and is assumed to be the course of practice in the more recent cases of *Burgkill* v. *The Archbishop of York* (*a*), *Barclay* v. *Earle* (*b*), and *Rooke* v. *The Earl of Leicester* (*c*). Such non-pros, however, being a non-pros before appearance, is no bar to another action (*d*). The whole effect, therefore, of the non-pros, if allowed to stand, would be no more than to put the demandant to the useless expense of suing out a second writ of right, unless, indeed, the sixty years expire before the non-pros is set aside, in which latter case the want of adjournment of the essoin by the demandant, if a sufficient ground for sustaining the judgment, would have the effect of barring the demandant's claim altogether. Under such circumstances, it is the duty of the Court to arrive at complete certainty that the tenant has

(*a*) 1 Lord Raym. 79.
(*b*) 2 Strange, 1194.
(*c*) 2 Term Rep. 16.
(*d*) Carth. 173.

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been right according to the very letter of the antient practice, before consequences so injurious to the demandant can be allowed to follow from so trifling an omission; for, at the present day, when much of the doctrine of essoins, which was formerly so familiar to the practitioner, has by long disuse become only the subject of study and research, it would indeed be matter of deep regret if the rights of claimants should be delayed, much more that they should be completely extinguished, by any mistaken application of rules of practice so obscure. And upon the facts of the present case, as they appear on the affidavits, we cannot satisfy ourselves that the tenant has pursued the course of practice that is strictly regular. The tenant upon the present occasion has, by his rule, fixed upon the day to which he contends the essoin ought by law to be adjourned by the demandant, viz. the 12th of April, in Easter Term. It is at least a matter of doubt whether the tenant has a right to fix any day to which the demandant should adjourn the essoin. In many of the antient essoin rolls which are to be found in the Treasury of this Court, the tenant or defendant casts his essoin generally, and there is an entry at the foot of the roll of a day given by the clerk of the essoins, which would appear to be the general day given for all the essoins upon that roll. But, at all events, if the tenant rules the demandant to adjourn the essoin to a given day, he must, by analogy to all the rules of practice, be careful that he is right in the day. In the present case, it appears that he has called upon the demandant to adjourn the essoin to a more distant day than the demandant himself was compellable to do; that is, the tenant gives himself a longer delay than he could require by law.

The rule laid down as the practice of the Common Pleas, in Booth on Real Actions (*a*) is, that, when the

(*a*) Page 18.

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tenant essoins in real actions, the demandant shall adjourn the essoin for fifteen days at least: referring to the statute 16 Car. 2, c. 6, which gives the days in banc for mesne process. So that the demandant would have satisfied all that the law required of him, if he had adjourned the essoin from the 8th January to the 23rd. But, still further, as the legislature has by the statute 24 Geo. 2, c. 48, s. 3, fixed the utmost period to which such day should extend, if the day given by the rule is a more distant day than the statute allows, the rule itself must be a nullity, and the non-pros which is founded upon such rule cannot be supported. Now, that statute (by s. 3.) enacts, that, where the writ in any real action is returnable in the octave of St. Hilary, that is, the first return of Hilary Term, *day shall be given* to eight days of the Purification, that is, the last return of the term. And although by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, Hilary Term is directed to begin on the eleventh and end on the 31st day of January; and by the 1 Will. 4, c. 3, s. 2, writs are directed to be made returnable as therein mentioned, and not with reference to the antient return days; yet, as there is nothing to repeal the statute 24 Geo. 2, above referred to, and certainly there was no intention by the late acts to favour dilatory proceedings, the times for proceeding in essoins which were before governed by that statute must still be measured by reference to the former return days. As, therefore, when the summons on the writ of right was returnable on the octave of St. Hilary, the essoin of the tenant could not fall later than the last return of Hilary Term; so, now, when the writ is returnable on the 8th January, the tenant cannot claim a more distant day than that which would have been the last return of the term, that is, the third day before the end of that term.

There were formerly four returns between the return day of the writ and the day to which the essoin was

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given; and although the return days are abolished, yet, as the statute did not affect to touch real actions, or their incidents, the time of the essoin must still be calculated with reference to what would have been the last return day of Hilary Term. But the tenant's essoin in this case is cast, as appears by his rule, until the 12th day of April, that is, until what would have been the fifth return, instead of the fourth. We therefore think the tenant has in this case, by taking out a rule postponing the day of his appearance to a longer period than the law allows, misled the demandant, and cannot now sign judgment of non-pros against him.

There is another ground upon which the demandant contends that the proceedings of the tenant ought to be set aside, viz. that the tenant has not complied with the direction given in Booth on Real Actions (*a*), where it is laid down that the demandant must adjourn the essoin, otherwise he may be nonsuited "if the tenant enter a ne recipiatur with the clerk of the essoins." But, as no authority is cited for this, we prefer resting our opinion upon the former objection to the proceedings on the part of the tenant, viz. that he has by his rule given a longer and more distant day for the adjourning his essoin than by law he was allowed to do.

We therefore think the judgment of non-pros should be set aside.

Rule absolute.

(*a*) Page 92.

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Friday, June 7th.

A watching and lighting act authorised the commissioners to make a rate upon all persons inhabiting, using, or occupying any houses, shops, mills, sheds, or *other buildings or tenements* within the township: —*Held*, that *sheds* erected to protect engines, for the more convenient working of a coal-mine, were rateable, although it was contended that they were exempt as being merely accessorial to the engines.

THIS was an action against the defendant for refusing to pay certain rates or assessments alleged to be due from him, and demanded by the plaintiff as clerk to the commissioners of the Hanley and Skelton Watching and Lighting Act. The declaration—after reciting part of an act of parliament passed in the 6th year of the reign of his late majesty King George the 4th, intituled "An Act for Watching and Lighting the townships and vills of Hanley and Skelton, in the parish of Stoke-upon-Trent, in the county of Stafford," by which five commissioners were impowered to rate the inhabitants of those townships and vills—alleged, that, by another act of parliament, passed in the 9th year of the reign of his said late majesty King George the 4th, it was enacted, "That, for raising money to pay the expenses of obtaining and passing that act and carrying the same and the 6 Geo. 4 into execution, it should be lawful for the said commissioners, and they were thereby authorized and impowered, from time to time, when and so often as they should think it necessary, to make, or charge, or levy, or cause to be made, or charged, or levied, a just and equitable pound rate or assessment, under the name and by the description of 'The Public Watching and Lighting Rate,' upon all and every the persons or person who for the time being should inhabit, use, or occupy any houses, shops, warehouses, manufactories, mills, lime-kilns, brick-kilns, slip-houses, stables, coach-houses, barns, *sheds*, cellars, vaults, counting-houses, offices, *or other buildings or tenements*, or any yards, gardens, orchards, or wharfs within the said townships or vills; and all such rates and assessments should from time to time be made prospectively and not retrospectively upon and according to a valuation or valuations of all and

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every the buildings and lands within the said townships or vills: provided that a deduction or allowance in the proportion of twenty-five per cent. per annum should be made or allowed in every such rate or assessment for, upon, or on account of every house, shop, warehouse, manufactory, mill, lime-kiln, brick-kiln, slip-house, stable, coach-house, barn, shed, cellar, vault, counting-house, office, or *other building or tenement*, or any yard, garden, orchard, or wharf within the said townships or vills, which should not be situated, from the nearest point, and measuring in the nearest direction, within two hundred yards of any public light or lamp to be placed up or erected under or by virtue of that act and of the said act of 6 Geo. 4, or the powers therein respectively contained." The plaintiff then averred that the defendant, long before and at the time of the making of the said rate or assessment thereinafter mentioned, used three several *buildings or engine-houses*, situated in the said township or vill of Skelton, in the county aforesaid; that, before and at the time of the making of the said rate or assessment, there were in and affixed to one of the buildings or engine-houses, certain parts of a certain pumping engine of the defendant; and that, before and at the time of the making of the said rate or assessment, the annual value of that building or engine-house, exclusive of the annual value of the said parts of the said pumping engine, was 15*l.* per annum, but the annual value thereof inclusive of the annual value of the said parts of the pumping engine, was 90*l.* per annum; and that there were in and affixed to the second and third of the buildings or engine-houses, certain winding engines of the defendant of the annual value, &c., &c. (as above); that the respective engines so affixed to the said buildings or engine-houses, before and at the time of the making of the rate or assessment thereinafter mentioned, were used by the defendant exclusively for the purpose of a colliery or coal-mine of the defendant, situate within the vill last

aforesaid, in the county aforesaid, and for the convenient and profitable working thereof, that is to say, the said winding engines for raising coals out of the said colliery to the surface of the earth, and the said pumping engine for getting out the water from time to time collected in the said colliery; that the said respective buildings or engine-houses were erected and always had been used by the defendant exclusively for the more convenient working of the said respective engines as aforesaid; that, whilst the defendant so used the said respective buildings or engine-houses and the said respective engines affixed thereto as aforesaid, to wit, on &c., at &c., five of the commissioners duly qualified and acting under the provisions of the said act, did then and there make and charge a just and equitable pound rate or assessment for raising money for carrying the said acts into execution, under the name and by the description of "The Public Watching and Lighting Rate," upon all persons who inhabited and occupied any houses, shops, warehouses, &c., &c., or other buildings or tenements within the said townships or vills; and the said five commissioners thereinbefore named rated and assessed the defendant by the said rate and assessment in respect of the said respective buildings or engine-houses and the said respective engines affixed thereto, at the sum of 11*l.* 10*s.* in respect of the said respective annual values of 90*l.*, &c., &c.; that the collector of the above rates duly demanded payment of and from the defendant, but that he refused to pay, and had not since paid the said rates, or any or either of them, or any part thereof.

To this declaration the defendant demurred specially, assigning for causes (among others) that it did not appear that the defendant had used any buildings for which he was liable to be rated, and that the plaintiff had alleged that the defendant had been rated and assessed at one entire sum, viz., 11*l.* 10*s.*, in respect of the annual values of the three several buildings, whereas, in point of fact, the as-

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sessments were divisible, and three separate and distinct assessments had been made and demanded in respect of each distinct building.

The plaintiff joined in demurrer. The cause now came on for argument.

Mr. Serjeant *Coleridge*, in support of the demurrer.—The declaration discloses no rateable property used by the defendant to render him liable to any rate or assessment under the provisions of the Hanley and Skelton watching and lighting acts. It is quite clear that the engines per se are not rateable, neither are the houses or sheds in which they are placed. It appears by the declaration that the engines were used solely for the more convenient working of the mine, and are accessory thereto; so, the buildings adjacent to or by which the engines are covered and protected, are accessory to the engines, and erected for their preservation alone, and neither can be liable to be rated unless the mines themselves are rateable. In the case of *The King* v. *The Overseers of Bilston* (*a*), where the owner and occupier of an iron-stone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose, it was held that he was not rateable to the poor in respect of the engine. If there were no engine-houses in this case, it is quite clear that the engines themselves are not rateable within the words or meaning of the act; and in *The King* v. *Bilston*, Mr. Justice Bayley said: "Here, a person working a mine in his own land has erected an engine for the purpose of working that mine, and which is of no other use. The occupier of the mine, as such, is not rateable under the provisions of the 43rd Eliz. c. 2. The engine must be considered as part and parcel of the mine, and is, as well as the mine itself, exempt from poor

(*a*) 5 Barn. & Cress. 851.

rates." And Mr. Justice Holroyd said: "The engine was not profitable, but burthensome, except as it respected the mine itself. Now, the profits arising from the mine are exempt from taxation, under the 43 Eliz. c. 2. The engine is therefore in like manner exempt." The principle established in that case must govern the present; and, as the engines themselves are not rateable, neither are the sheds which cover them, and which are mere accessories for their protection and preservation. In the case of *The King* v. *Bradford* (*a*), a canteen in barracks demised to B. by the barrack board, for a year, at a rent of 15*l.* for the canteen and buildings, and also the further sum of 500*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors usually sold by sutlers, with a power of distress for the aggregate sum, was held to be one entire rent for the canteen: and consequently B. was held rateable to the relief of the poor as occupier of the canteen, in respect of the 515*l.* aggregate rent, and not only in respect of the 15*l.*: and Lord Ellenborough said: "I cannot look at the reservation in this indenture in any other point of view than as a mode which the parties have chosen of dividing the rent; for, it is in substance but one entire rent, payable for the occupation of a real tenement, and for the enjoyment of the advantages belonging to it. From its vicinity to the barracks it of course would attract to it almost all the custom of that neighbourhood, and this is the incident to the property which renders it valuable. If this could be separated from the value of the tenement, and the rent distributed accordingly, we should henceforth never see a demise of any public house in which this form of distribution would not be observed." Here, however, the engines and machinery are not rateable, unless they can be deemed as inseparably connected

(*a*) 4 Mau. & Selw. 317.

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with property which is rateable, and the engine-houses make no difference, as they were erected for the exclusive use of the machinery and the working of the engines themselves; and therefore there was no beneficial occupation by the defendant with respect to a rateable subject matter. In the case of *The King* v. *Lord Granville* (*a*), it was held that a lessee of a coal mine, being the occupier, having erected a steam-engine for working the mine, and thereby improved its annual value, was liable to be rated for such improved annual value: and Mr. Justice Bayley said (*b*): "If the owner had occupied the mine, he would have been liable to be rated according to the improved value of the property; and, where the owner of a mine fixes an engine, or otherwise, by expenditure of his capital, raises the value of his property, he will be rateable for the value of that property so improved by his expenditure." But that was under the statute of Eliz. So, in *The King* v. *Attwood* (*c*), it was held that the lessee of coal mines was rateable for the amount of royalty or rent which he pays. But, as coal mines are not rateable per se under the act in question, neither can the engines, which are mere adjuncts to the mine, and which are not mentioned in the statute. Although it may be said that there is no necessity for a beneficial occupation, as the rates were imposed prospectively, according to the valuation of the property within the townships or vills in question, yet all the lands are not rateable: and the engines are not mentioned in the act as being the subject of a rate: and, although the word "buildings" is introduced, it cannot be taken to apply to a mere covering of an engine; and, in order to render the engine-houses in question rateable, there must be express words, and not those of mere implication. So, the word "shed" must be taken

(*a*) 9 Barn. & Cress. 188. (*b*) 9 Barn. & Cress. 190.
(*c*) 6 Barn. & Cress. 277.

to apply to a covering for the protection of cattle, as it follows the word "barns;" and slip-houses are outside warehouses for the drying of pottery ware; and, if a shed were erected in a field which was not rateable, neither could the shed be deemed rateable as such.

Mr. Serjeant *Peake*, for the plaintiff, was stopped by the Court.

Lord Chief Justice TINDAL.—I think this case must be determined on the precise words of the act, by which certain rates are imposed on persons inhabiting or using houses, mills, &c., within the township in which the engine-houses in question are situate. The act is altogether different from the statute of Elizabeth; and it is not necessary to follow the principles which have been laid down with regard to that statute; neither does the case of *The King* v. *Bilston* appear to me to apply to the present; for, by the Hanley and Skelton watching and lighting act, the commissioners are authorized and empowered to make a just and equitable pound rate or assessment upon "all and every the persons and person who for the time being shall inhabit, use, or occupy any houses, shops, warehouses, manufactories, mills, lime-kilns, brick-kilns, slip-houses, stables, coach-houses, barns, sheds, cellars, vaults, counting-houses, offices, or *other buildings or tenements* within the said townships or vills." The act, therefore, enumerates and specifies every possible species of property of which there may be a beneficial use, as being subject to the rate. The declaration states that the rate was imposed on the defendant for using three several buildings or engine-houses, in the township of Skelton; that certain engines were affixed to them; and that the annual value of one of the buildings, or engine-houses, exclusive of the annual value of the engine, was 15*l.* per annum, but the annual value, inclusive of the an-

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nual value of the engine, was 90*l.* per annum. There was a similar statement with respect to the annual value of the two other buildings and engines affixed to them, exclusive and inclusive of the engines; and it was then alleged that the engines were used by the defendant exclusively for the purposes of a colliery, and for the convenient and profitable working thereof. It appears to me that there can be no doubt as to the intention of the statute; and that the language is sufficient to authorize the rate, under the word "buildings." The word "shed" might perhaps be sufficient, as constituting a covering to something on land situate within the township; particularly as it appears that the engine-houses were erected for a valuable purpose. But the words "other buildings," constitute nomen generalissimum, which will include the houses in question. The rate, therefore, having been imposed on *buildings* within the township, it is not necessary to advert to the subject matter in respect of which the buildings were erected. The cases of *The King* v. *Bilston* and *The King* v. *Lord Granville* do not appear to me to apply to the present, which must be decided on the words of the act before us. In the latter case, which was decided on the statute of Elizabeth, the subject matter which was necessary to constitute a right to impose the rate, was not shewn to exist; but here there is a distinct enumeration of every possible species of occupation, and the rate in question is imposed on buildings generally within the township. It is therefore unnecessary to consider to what ultimate purpose the engine-houses were appropriated.

Mr. Justice PARK.—I am of the same opinion. If this case fell within the principle of *The King* v. *Bilston*, the question would be altogether different. But here the words of the act imposing the rate are clear, and the most general that can possibly be imagined, whilst those

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in the statute of Elizabeth are widely different. If the erections in question can be deemed sheds, buildings, or tenements, the engines within and affixed to them are not a mere adjunct of machinery, but form a substantial part of the engine-houses, and constitute a legitimate subject of the rate imposed by the act. In the case of *The King* v. *Hogg* (*a*), it was decided that personal property, if visible and yielding a certain annual permanent profit, is rateable; and therefore that a house and engine for carding cotton, which were rented as one entire subject, and described by the general name of an engine-house, were rateable; and that case was confirmed by Mr. Justice Bayley, in *The King* v. *Bilston*, where that learned Judge said: "The carding-engine in *Rex* v. *Hogg*, and the weighing-machine in *Rex* v. *St. Nicholas, Gloucester*, were each considered as part and parcel of a *building*, and were rated as such." So, here, the engines are part and parcel of the buildings or engine-houses. The preamble of the act shews the intention for which it was passed, namely, "the safety of the inhabitants and all persons resorting to the township, and a better security to all the property situate within it."

It is quite clear that the defendant derives a beneficial interest from the occupation of the engine-houses: and I remember a case tried at Lancaster, in 1812, before Mr. Justice Le Blanc, where it was contended that the word "mill" did not apply to a water-mill; but that learned Judge, having consulted Mr. Baron Thompson, asked, "If it be not a mill, what is it?" So, here, the word "shed" is not to be confined to a covering for cattle: but, independently of that, the houses in question fall within the general description of buildings, and as such are within the words and meaning of the act.

Mr. Justice GASELEE.—The word "buildings" is far

(*a*) 1 Term Rep. 721.

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more comprehensive than I at first thought. The declaration alleges that the engines were in and affixed to the engine-houses, and the annual value was estimated exclusively and inclusively of the engines. I cannot distinguish this case, in principle, from those of *The King* v. *Hogg* and *The King* v. *St. Nicholas, Gloucester*, where the carding-engine and weighing-machine were each considered as part and parcel of a building. So, here, the engines constituted part of the engine-houses, and it is quite clear that the latter are buildings within the words and meaning of the act, and are rateable as such.

Mr. Justice BOSANQUET.—I am of opinion that the buildings or engine-houses, and the engines in and affixed to them, are rateable. The question must be decided on the letter and spirit of the act; the statute 43 Eliz. was passed diverso intuitu. The rates imposed by the act in question were for the purpose of defraying the expenses attendant on watching and lighting various descriptions of property enumerated in the act within the township in which the engine-houses in question are situate. Although the mines themselves derive no benefit from the lighting, yet property of this description may. The words "other buildings," considering those with which they are associated, may be taken to embrace every species of property which may derive a benefit from watching or lighting, such as warehouses, manufactories, houses, &c., and all property ejusdem generis with that specified in the act; and all the property is to be rated according to the distance from any public light or lamp to be erected by virtue of the act, namely, within three hundred yards of such light or lamp. The word sheds, in its general sense, may be taken to apply to all sheds or coverings; and, although the word offices may be deemed to be confined to offices used for the transacting or carrying on of business, yet the words "other buildings,"

taken with those which precede them, include the engine-houses, and, as the engines are affixed to and form part of the buildings, they are rateable within the meaning of the act.

Judgment for the plaintiff.

MUNK *v.* CLARKE, Official Assignee.

Tuesday, June 11th.

An action for money had and received lies against an official assignee appointed by the Court of Review, to recover money received by him whilst acting under a void commission, and not paid into the Bank of England as directed by the 1 & 2 Will. 4, c. 56, s. 22.

Quære whether the bankrupt, who procured the appointment of the defendant to the office of assignee, could afterwards charge him with having received moneys of the bankrupt to his, the bankrupt's, use—semble not.

THIS was an action of assumpsit brought to recover the sum of 80*l.*, alleged to have been received by the defendant to the plaintiff's use. A verdict having been found for the plaintiff, a rule nisi was obtained on the part of the defendant, for a new trial; whereupon the following case was stated for the opinion of the Court:—

"A commission of bankrupt issued against the plaintiff, dated in 1824, and the defendant was afterwards appointed official assignee under the commission. The sum claimed in this action was received from a tenant of the plaintiff's estate by the defendant as official assignee, and as such he signed a receipt for the amount.

"The plaintiff had applied to a commissioner of bankrupt, to appoint an official assignee to investigate if any debt was due to the petitioning creditor, to enable him, the plaintiff, to dispute the validity of the commission.

"It was agreed to be taken as a fact, for the purpose of this case, that the plaintiff was not a bankrupt at the time the commission of bankrupt issued."

The questions for the opinion of the Court were—first, "whether the defendant was liable in this action, the money sought to be recovered having been received by him in his character of official assignee"—secondly, "whether the application made by the plaintiff, as above, would preclude him from maintaining the action."

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Mr. Serjeant *Bompas*, for the plaintiff.—There is no ground for supposing an official assignee appointed under the authority of the statute 1 & 2 Will. 4, c. 56, to be placed in any other situation than other assignees; and there is no reason for extending to him any such protection as is now contended for. The 22nd section of the act, which authorizes the appointment of official assignees, exempts them from no responsibilities that the law has imposed upon assignees generally: it provides that "all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of the sale of all the estate and effects, real and personal, of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said Court of Bankruptcy or any Judge or commissioner thereof; and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England to the credit of the Accountant-General of the High Court of Chancery, to be subject to such order, rule, and regulation for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the Lord Chancellor, or the Court of Review, or any Judge of the said Court of Bankruptcy, if authorized so to do by any general order of the same Court, shall direct; and, if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed so to do: provided always, that, until assignees shall be chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with

the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estates and effects." In *Baker* v. *Neaver* (*a*), the Court of Exchequer, in an action by the assignees of a bankrupt, held that the official assignee must be joined as a plaintiff. The official assignee would clearly be liable in trover for converting the bankrupt's goods. So, he must also be liable for money had and received; and he would not be discharged even by handing over the money to the custody to which it is his duty to hand it over. There is no pretence, however, for saying that the defendant has paid over the money as directed by the statute: and, even if he has done so, it would not be out of his control. The words of the 17th section of the act are prospective only. They are of similar import to those of the 92nd section of the 6 Geo. 4, c. 16, as to which Lord Chief Justice Tindal, in *Key* v. *Goodwin* (*b*), says—" It seems to me, that, if the 92nd section be considered as affecting commissions which were then in course of operation, it would most materially alter the situation both of the bankrupt and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees and other persons, to conclude him as a bankrupt, without the possibility of giving him the opportunity to contest his bankruptcy within that period of time which the statute meant to allow him."

With respect to the application made on the part of the bankrupt to the commissioners for the appointment of an official assignee—It will be contended that he is concluded by that step from complaining of the acts of the party who, it is said, he has thus made his own agent. But, when the application was made to the commissioners, it was

(*a*) 1 Cromp. & Meeson, 112.
(*b*) 4 Moore & P. 352; S. C. 6 Bing. 576.

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understood to be the only proper course for investigating the debt of the petitioning creditor. In *Heane* v. *Rogers* (*a*), in an action of trover brought by a person against whom a commission of bankrupt had issued, against his assignees, to recover goods which they had as such assignees sold, it appeared that the bankrupt had assisted the assignees by giving directions as to the sale of the goods, and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held, that he had become bankrupt, and that he was willing to give up the farm, and in consequence the lessors received the lease, and accepted possession of the premises: it was held that the interference of the plaintiff in the sale of his goods was referable to an intention on his part to take care of the property, and see that the most was made of it, and that it did not amount to an assent to the sale, and that he was not thereby estopped from bringing an action against his assignees; and also that the plaintiff was not estopped by the act of having given up his lease to his lessors, the assignees not being parties or privies to that transaction. Mr. Justice Bayley, in delivering the judgment of the Court there, said (*b*): "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but, as to third persons, he is not bound."

Mr. Serjeant *Jones*, for the defendant.—Under the cir-

(*a*) 9 Barn. & Cress. 577. (*b*) 9 Barn. & Cress. 586.

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cumstances, this action for money had and received cannot be maintained against this defendant. The commission under which the plaintiff was declared a bankrupt was subsisting before the passing of the statute 1 & 2 Will. 4, c. 56, and was transferred to the newly erected jurisdiction by virtue of the 39th section. In *Raw* v. *Cutten* (*a*), the defendant, a messenger attached to certain lists of commissioners of bankrupt in London, and by them appointed provisional assignee of the estate of a bankrupt, sent an agent or servant to take possession of the bankrupt's effects: the agent received a considerable sum of money, and absconded; and it was held that the defendant was not liable for the amount in an action for money had and received, no negligence or want of proper caution being attributable to him. Here, the defendant, as official assignee, has done no more than he was in duty bound to do. He is a mere minister of the Court of Review, appointed to receive the bankrupt's estate and pay it over in a particular manner: his duties are prescribed by the act. As to the payment over of the money: it was the defendant's duty to pay it over, and the Court will presume that he has done so. At all events, if he has failed in this respect, he is responsible to the Court of Review. In *Greenaway* v. *Hurd* (*b*), it was held that assumpsit for money had and received does not lie against an excise officer, to recover duties received by him after the act imposing them was repealed, if he had paid them over to his superior.

Then, the appointment by virtue of which the defendant did the acts complained of was made at the instance of the plaintiff himself: he is therefore estopped by his own act from suing the defendant for any thing done by him in the character which the plaintiff himself contribut-

(*a*) Ante, Vol. 2, p. 123; S. C. 9 Bing. 102. (*b*) 4 Term Rep. 553.

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ed to impose upon him. In *Like* v. *Howe* (*a*), it was ruled by Sir James Mansfield, that, if a trader against whom a commission of bankrupt has issued has acquiesced in it so far as to go to the different creditors, to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had and received against those persons, whether he is an object of the bankrupt laws or not. In the present case, the plaintiff, having himself called the official assignee into existence, cannot now object to his having done that which the act of parliament made it imperative upon him to do.

Mr. Serjeant *Bompas*, in reply.—The decision in *Greenaway* v. *Hurd* proceeded upon the ground that the party receiving the money received it as the agent and on behalf of his superior; and the answer to the case of *Like* v. *Howe* is given by Mr. Justice Bayley in *Heane* v. *Rogers*. All the duties of an assignee depend upon the validity of the commission under the authority of which he acts; and he acts at his own risk. Here, the commission is admitted to be bad.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

This case was brought originally before the Court upon a motion by the defendant to set aside a verdict for the plaintiff upon the ground of such verdict being against evidence; and, after hearing cause shewn against that rule, the Court made it absolute on payment of costs. But, upon its being suggested that it might save much expense to the parties if the Court would, in the first instance, declare their opinion on two points, viz. first, whe-

(*a*) 6 Esp. Rep. 20. And see *Flower* v. *Heeber*, 2 Vez. 236.

ther an action for money had and received was maintainable by the bankrupt against the official assignee, for money received by him in that character; and, secondly, whether, in this particular case, the bankrupt was estopped from suing the official assignee, by reason of his having himself applied to the commissioners of bankrupt for the appointment of an official assignee—the case has been again argued with reference to these points only: and, after hearing such argument, we are of opinion, upon the first point, that, assuming the official assignee has not paid the money received by him from the bankrupt's estate into the Bank of England, to the credit of the Accountant-General, as directed by the statute 1 & 2 Will. 4, c. 56, s. 22, before notice or demand given to or made upon him by the bankrupt, but that he still retains such money in his own hands, there is no objection against maintaining the present action simply on the ground of his character as official assignee. As, however, it is not stated to us whether such money has been paid over according to the directions of the act or not, it will be sufficient to state that the opinion now given by us depends upon the supposition that the money is still retained by the defendant. There is no clause in the statute creating this office by which an exemption from personal liability is expressly given to the official assignee under circumstances which would render the assignees chosen by the creditors personally responsible. If, therefore, he has any such special exemption, it must arise either from the mode of his appointment, or from the nature and description of the duties which he has to perform. As to the mode of his appointment, it is enacted by the 22nd section of the act, that one of the thirty persons chosen by the Lord Chancellor shall be the official assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors. The clause then proceeds to direct that all the personal estate and effects and all the rents and profits of

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the real estate of the bankrupt shall be possessed and received by such official assignee alone; and that all monies shall be forthwith paid by such official assignee into the Bank of England, to the credit of the Accountant-General, subject to the orders of the Court of Chancery, or of the Court of Bankruptcy; he (the official assignee) being liable in the same manner as other assignees, if he neglects to pay over such money; and the section then concludes by stating, "that, until assignees shall be chosen by the creditors, such official assignee so to be appointed to act with the assignees to be chosen by the creditors, shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects." There appears, therefore, no other distinction in the appointment of the different assignees, except that the official assignee is appointed by the Lord Chancellor, the other assignees chosen by the creditors; and the principal difference between their duties is, that the official assignee alone can receive all the monies and the profits of the real estate of the bankrupt. This mode of his appointment differs not materially from that of a provisional assignee under the former acts, who was an officer appointed by the commissioners acting under the authority of the Lord Chancellor, and who would unquestionably be liable to refund to the bankrupt money collected from the estate and still remaning in his hands, supposing the bankrupt able to impeach the validity of the commission. Here, the official assignee is appointed by the commissioners out of a certain number before chosen by the Lord Chancellor. In the absence, therefore, of any authority to that effect, we see nothing in the mode of his appointment which can in any way create an exemption in his favour as to his personal responsibility under the same circumstances. In one case, indeed, the statute expressly enacts, that, if there be *only* the official assignee in any case, he shall be deemed to be, to all

intents and purposes whatsoever, a sole assignee of such bankrupt's estate and effects. Such a declaration of his rights and powers would seem to imply also a similar declaration of his liability; and, as an ordinary assignee chosen by the creditors who should have money in his hands collected from the bankrupt's estate, would be liable to refund the same to the bankrupt, as being his money, in case he should be able to disprove the bankruptcy, so also we think, in the present case, the official assignee, who, if he is the sole assignee, is by that act deemed to be to all intents and purposes the same as a sole assignee chosen by the creditors, is liable to the same actions as such assignees where the same circumstances take place.

As to the second question above raised, the facts attending the application to the commissioners relative to the appointment of the defendant as official assignee, are not stated with any degree of precision or accuracy. We can only say, therefore, in general terms, that, if the defendant should turn out to have been appointed to the office through the means, instrumentality, or procurement of the plaintiff, it will be very difficult to say that he can have any right to maintain this action. It was the duty of the defendant when appointed to receive the money in question; he had no option, under the statute; and this was well known to the plaintiff at the time of his appointment. Whatever may have been the object or motive of the plaintiff, whether to enable himself to dispute the commission, or for any other purpose, can make no difference in the duty imposed by the statute on the defendant. The moment he was appointed, that duty attached upon him: and we think it at least very doubtful whether the bankrupt, who assisted in or procured the appointment of the defendant to an office of which the duty was to receive the rents of his estate for the use of the creditors, can afterwards turn round upon him and charge him with having received those rents to the use of himself, the bankrupt. The case

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referred to of *Like* v. *Howe* (*a*) appears a strong authority to that point. A new trial, therefore, must be had, if the parties think it advisable.

Rule absolute.

(*a*) 6 Esp. Rep. 20.

TENNY, on the demise of WHINNET and Another, *v.* JOHN and ROBERT JONES.

Saturday, June 8th.

J. H., being seised in fee tail in possession of certain premises, and being also seised of the immediate reversion in fee, infeoffed his brother R. H. thereof in fee. R. H. never took possession, and the deed of feoffment remained in the custody of the feoffor. J. H., the feoffor, died in 1780, whereupon his son Robert entered, and the premises continued to be occupied by him and his lessees down to the year 1826, when he died, having in the mean time suffered a recovery of the premises, and devised them to the lessors of the plaintiff:—*Held*, that this long uninterrupted possession by the feoffor, and those claiming under him, warranted the presumption that the premises had been reconveyed to the feoffor.

THIS was an action of ejectment, and brought to recover eight acres of land situate in the parish of Chalgrave, in the county of Bedford. At the trial before Mr. Baron Vaughan, at the Spring Assizes for Bedford, in 1830, the following facts were directed by the learned Judge to be stated for the opinion of the Court, in a special case, as follows:—

In the year 1717, Robert Hawkins, being seised in fee of the premises in question, conveyed them to trustees to the use of himself for life, remainder to his then intended wife Sarah, for life, remainder to the use of the heirs of the body of the said Robert Hawkins on the body of the said Sarah lawfully begotten or to be begotten, and, for default of such issue, to the use of the right heirs of the said Robert Hawkins, in fee. The marriage took effect. Robert Hawkins died in or about the year 1729, intestate as to the premises in question, leaving Josiah his eldest son, and his wife Sarah, him surviving. She died in or about the year 1764. There were issue of the marriage, Josiah and Robert. Josiah being seised in fee tail in possession of the premises, and being also seised of the immediate reversion in fee of the same as aforesaid, by indenture of feoffment of the 13th November, 1779, enfeoffed his brother Robert of the same in fee. Josiah Hawkins died in or about the year 1780, intestate, leaving issue Robert, hereinafter mentioned, his only son and heir-

at-law, and Elizabeth, a daughter, married to John Jones, one of the defendants, which John Jones had issue by the said Elizabeth Jones, Robert Jones, the other defendant. Robert Hawkins, son of Josiah, was proved to have occupied the premises in question for forty years, until he let them to Whinnett, one of the lessors of the plaintiff, who held them about six years. By indentures of lease and release of the 5th and 6th May, 1789, the last-mentioned Robert Hawkins, therein described as only son and heir of Josiah Hawkins, the eldest son and heir of the first-mentioned Robert Hawkins begotten upon the body of the said Sarah, for barring and destroying all estates tail and all reversions and remainders thereupon of and in the premises (which were therein stated to be then in the occupation of the said Robert Hawkins, son of Josiah), conveyed the same to Henry Toten and his heirs, as tenants to the præcipe, in order that a common recovery might be thereof had, which it was thereby declared should enure to the use of the said Robert in fee; and a recovery was accordingly suffered of the premises of Easter Term, 29 Geo. 3. The last-mentioned Robert Hawkins died in 1826. By his will, duly executed to pass freehold property, dated June 3rd, 1826, he devised the premises to Thomas Whinnett and William Osborne, the lessors of the plaintiff. Robert Hawkins, the feoffee, brother of Josiah, by his will, dated in the year 1788, duly executed and attested for passing real estates, after devising a certain dwelling-house, therein described, to his wife, Susannah Hawkins, in fee, and after disposing of his personal estate, gave and devised all his freehold and copyhold estates whatsoever and wheresoever to his wife Susannah Hawkins, in fee. He died in 1788, without revoking or altering his said will. Susannah survived her husband, and died in the year 1807. There was no proof of any ejectment brought or claim made by her to or for the premises in question. Elizabeth, the wife of

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the defendant, John Jones, and mother of Robert Jones, the other defendant, in June, 1829, entered with the two defendants into the premises in question, and remained and still continued in possession of the same. An action of trespass was brought in Trinity Term, 1829, in which the lessors of the plaintiff were the plaintiffs, and the present defendants were the defendants. In that action the present defendants suffered judgment to go by default, and a writ of inquiry was thereupon executed, and damages recovered. The deed of feoffment of 1779, and all the title deeds, came from the possession of the lessors of the plaintiff, and were produced by them at the trial on notice given them by the defendants.

Upon proof of these facts the learned Baron directed the jury to find a verdict for the plaintiffs, considering himself warranted in directing them to presume a reconveyance from the feoffee to the feoffor; but he further ordered the verdict to be subject to the above special case, in which the questions whether the jury ought to presume such reconveyance, and whether the lessors of the plaintiff had made out a good title to the premises in question, so as to entitle them to recover in this action, and also all other questions affecting their right to recover, were to be determined by the Court.

The case now came on for argument.

Mr. Serjeant *Wilde*, for the lessors of the plaintiff.—As the lessors of the plaintiff derived title to the premises from Robert Hawkins, the issue in tail of Josiah, the feoffee, who, in 1789, suffered a recovery to enure to his own use in fee, and remained in possession to the time of his death, in 1826, when the lessors of the plaintiff entered as devisees under his will, and continued in possession till 1829, the defendants' claim under the deed of feoffment by Josiah Hawkins to his brother Robert in 1779, was

made too late. It does not appear that the feoffee or his widow ever entered or claimed possession under the deed, which remained in the possession of the family of the feoffor. This is the simple case of an ejectment by the devisees of the heirs of a tenant in tail, who has been in the undisturbed possession of the premises sought to be recovered for a period of forty-six years; which of itself is sufficient to vest a legal title in the lessors of the plaintiff. In *Doe* d. *Harding* v. *Cooke* (*a*), Lord Chief Justice Tindal said: "It was proved that the elder Harding and his son (the lessor of the plaintiff in ejectment,) held the premises for twenty-three years, and during that time received and increased the rent—an unequivocal act of ownership from which the law presumes a seisin in fee." And Mr. Justice Park said: "We alter no rule of law by deciding in favour of the lessor of the plaintiff. He has shewn a presumptive title, arising out of twenty-three years' possession." The Court being placed in the situation of a jury, will make every presumption in favour of such a length of possession; and they will presume a reconveyance by the feoffee to the feoffor; or a release, which, as the feoffor remained in possession, would remit him to his original estate; or a recovery in formedon, so as to work a disseisin of the feoffee. Even if Robert Hawkins, the brother of Josiah, had been duly enfeoffed, yet, as there was no entry either by him or his widow, or claim by the latter, twenty years' adverse possession from the death of the feoffee would give the plaintiffs a sufficient title to recover in this action, which is of a possessory nature: and the defendants failed to prove any entry or claim till 1829, when they suffered judgment by default in an action of trespass; thereby acknowledging themselves to be trespassers. Although it may be said that the estate tail of Josiah was discontinued by the feoffment; yet, as he was not only seised in fee tail in pos-

(*a*) 7 Bing. 346; S. C. 5 Moore & P. 181.

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session, but also of the immediate reversion in fee, his feoffment of his brother Robert did not effect a discontinuance. In Coke Littleton (*a*), it is said: "If land be given in tail, saving the reversion to the donor, and after the tenant in tail by his deed enfeoff the donor, to have and to hold to him and his heirs for ever, and deliver to him seisin accordingly, &c., this is no discontinuance, because none can discontinue the estate tail, unless he discontinue the reversion of him who hath the reversion, &c., or remainder, if any hath the remainder, &c. And, inasmuch as by such feoffment made to the donor (the reversion being then in him), his reversion was not discontinued nor altered, &c., this feoffment is no discontinuance, &c.; and, in the same manner it is where lands are given to a man in tail, the remainder to another in fee, and the tenant in tail enfeoff him that is in the remainder, to have and to hold to him and to his heirs; this is no discontinuance."

So, in Rolle's Abridgment (*b*): "If tenant in tail enfeoff the donor, this is not any discontinuance, because the donor hath the immediate estate." In Comyns's Digest (*c*), it is said: "A discontinuance of an estate in lands and tenements is where, by the alienation of tenant in tail, or any seised en auter droit, the issue, heir, successor, or reversioner, cannot enter, but shall be put to his action. So that, if a tenant in tail, by feoffment, &c., aliens in fee, in tail, or for the life of another, and dies, his issue, or, if he dies without issue, he in reversion or remainder cannot enter, but is put to his formedon." "So, if tenant in tail conveys to him who has the immediate remainder or reversion dependant upon the estate tail, it does not make a discontinuance" (*d*). There cannot be a discontinuance, if the reversion be not displaced. In *Baker* v. *Hacking* (*e*),

(*a*) Sections 625, 626.
(*b*) Vol. i. 633, pl. 45.
(*c*) Tit. "Discontinuance," (A. 1), (A 4).
(*d*) Com. Dig. "Discontinuance," (C 5)
(*e*) Cro. Car. 387, 405.

where a tenant in tail and a reversioner joined in a lease for life by deed, and the reversioner, during the lease, devised the reversion and died, and afterwards the tenant in tail died without issue; the question was whether the devise was good; and Mr. Justice Croke held that it was not a discontinuance of the reversion, because the reversioner joined with the tenant in tail; and that, although during the life of the lessee it was a discontinuance quoad the tenant in tail and his issue, it was not so as to the reversion, for that remained as it was: and, in *Walsingham's* case (*a*), it was agreed by the Court, that, if a tenant in tail, the reversion being in the King, make a feoffment, it does not discontinue the estate tail, because it cannot discontinue the reversion in the King: and it was said (*b*): "If the reversion in fee is not taken away or discontinued, the estate tail cannot be discontinued, as it appears in Littleton, and also in 9 Edw. 4." Here, however, even if there were a discontinuance by the feoffment, yet, as the feoffee and those claiming under him made no entry or took possession for forty-six years, and the issue in tail in possession suffered a recovery to enure to his own use in fee, and the deed of feoffment and all the other title deeds remained in his custody, the Court will presume that he was rightfully in possession: and the defendants adduced no evidence at the trial to repel such a presumption. The case of *Doe* d. *Fisher* v. *Prosser* (*c*), is stronger than the present. There, it was held that thirty-six years' sole and uninterrupted possession by *one tenant in common*, without any account to, or demand made, or claim set up by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant. In *Fanshaw* v. *Rotherham*, Lord Keeper Henley said (*d*): "It is true that, in all cases of temporal rights, the

(*a*) Plowden, 555.
(*b*) Plowden, 562.
(*c*) Cowp. 217.
(*d*) 1 Eden, 296.

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Courts of law consider quieta longa et pacifica possessio as the best evidence of title. I think it one of the wisest and most solid rules of law. They will therefore presume stale titles in writing barred by other conveyances probably lost, because the possession contrary to those conveyances cannot otherwise be accounted for. Possession is so strong a title that a Judge may have emphatically said he would presume an act of parliament to support and confirm it:" and here the heir of the feoffor not only remained in possession for forty-six years, but the deed of feoffment itself was in his custody, and produced at the trial from the muniment chest of his family. In *Roe* d. *Johnson* v. *Ireland* (*a*), where a surrender had been made to churchwardens and their successors in 1636, without naming any rent, but, in 1649, the parliamentary survey charged the churchwardens with 6*d.* rent, under the head of "*freehold* rents," and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: it was held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804, and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it; and, in the case of *The Countess of Dartmouth* v. *Roberts* (*b*), where the plaintiff proved an uninterrupted enjoyment by the perception of tithe hay by himself and his ancestors for a long series of years, Lord Ellenborough said (*c*): "In favour of modern enjoyment, which is the best interpreter of right, where documentary evidence does not exist, we will, in conformity with Lord Kenyon, who said that he would presume

(*a*) 11 East, 280. (*b*) 16 East, 334. (*c*) 16 East, 339.

two hundred deeds if necessary, presume here that a disseverance took place:" and Mr. Justice Le Blanc said: "Where the uniform course of enjoyment has been with the plaintiff, the Court will presume every thing necessary for the support of it." In the case of *The Attorney-General* v. *Lord Hotham* (*a*), the Master of the Rolls said: "Very high Judges have said they would presume any thing in favour of a long enjoyment and uninterrupted possession." In *Bealey* v. *Shaw*, which was an action on the case for diverting a water-course, Lord Ellenborough said (*b*): "I take it that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament;" and in *Roe* d. *Johnson* v. *Ireland* (*c*), the enfranchisement of a copyhold was presumed upon proper evidence even against the crown. In *Pickering* v. *Lord Stamford* (*d*), the Master of the Rolls said: "Every presumption that can fairly be made shall be made against a stale demand. It may arise from the acts of the parties, for, the very forbearance to make the demand affords a presumption either that the party is conscious it was satisfied or intended to relinquish it:" and here the heir of the tenant in tail not only suffered a recovery, but the possession followed it, and continued uninterrupted to 1829, being a period of forty years. In Viner's Abridgment (*e*), a recovery having been suffered a long while since, a deed to make a tenant to the præcipe was presumed. And, where a title was made from the Black Prince, which could not be out of him but by an act of parliament; yet, because the possession had gone otherwise ever since, the Court presumed that there had been such an act of parliament, although it was not then to be found (*f*).

(*a*) 1 Turn. & Russ. 218.
(*b*) 6 East, 215.
(*c*) 11 East, 280.
(*d*) 2 Ves. 583.
(*e*) Vol. 12, p. 57, tit. "Evidence," (Q. a.), pl. 7.
(*f*) Vin. Abr. Vol. 12, p. 58, tit. "Evidence," (Q. a.) pl. 11.

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In *Read* v. *Brookman*, Mr. Justice Buller said (*a*): "For these last two hundred years it has been considered as clear law that grants, letters patent, and records, may be presumed from length of time;" and in *Warren* d. *Webb* v. *Greenville* (*b*), a surrender of a tenant for life was presumed on a recovery of forty years standing.

Here, therefore, from the length of possession by the issue in tail of the feoffor, the Court will presume that he was rightfully in possession, and will not decide in favour of an adverse claimant under the deed of feoffment, which was found in the possession of the lessors of the plaintiff, who acquired such possession under the devise to them by the heir of the feoffor, who had barred his estate tail by suffering a recovery in 1789.

Mr. Serjeant *Talfourd*, contra.—This case raises three questions for the determination of the Court—first, whether the deed of feoffment by Josiah Hawkins to his brother Robert, in 1779, operated as a discontinuance of the estate tail—secondly, whether, as the deed was found in the possession of the family of the feoffor, he was remitted to his original estate—and, lastly, whether, from the length of possession by the heir and issue in tail of the feoffor, a reconveyance from the feoffee might be presumed.

[The Court here requested the learned Serjeant to confine himself to the latter point only.]

Although, in cases of long and uninterrupted possession, Courts of law and equity have raised presumptions in its favour, yet such presumptions depend on matters of fact, and the surrounding circumstances of each particular case as brought before the Court or a jury. Mere length of possession is not of itself sufficient; and there is no imperative rule of law on the subject. In *Doe* d. *Fenwick* v. *Reed*, Lord Chief Justice Abbott said (*a*): "In my opinion, presumptions of grants and conveyances have already

(*a*) 3 Term Rep. 158. (*b*) 2 Stra. 1129.
(*c*) 5 Barn. & Ald. 236.

gone to too great length, and I am not disposed to extend them further." And Mr. Justice Bayley said: "I thought at the trial, and I think still, that the question for the jury was whether, in fact, a conveyance had ever been made. I considered it as a mere question of fact, and I called their attention to such circumstances as I thought tended to prove or to negative it." In *Livett* v. *Wilson* (*a*), where the defendant pleaded a grant of right of way by deed subsequently lost, and the plaintiff traversed the grant, and there was conflicting evidence as to the uninterrupted user of the way, Mr. Justice Gaselee told the jury that, if, upon the issue, they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that the deed had been lost, they would find a verdict for thedefendant; but that, if they thought there had been no way granted by deed, they would find for the plaintiff: and the Court held that this direction was right. In *Doe* d. *Smith* v. *Pike* (*b*), where an heir in tail brought ejectment against a defendant, who had been in the receipt of the rents thirty years during the life of the ancestor in tail, and seven years after his death; and the ancestor had had seisin: it was held that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by shewing that the ancestor had not conveyed by fine and recovery: and, in *Cookson* v. *Coates* (*c*), where, in an action for the disturbance of a right of way, the defendant pleaded non user for forty-seven years, and the plaintiff replied a deed which had been lost by time; Mr. Justice J. Parke left it to the jury as a question of fact whether there had been such a deed or not; and, the jury having found in the affirmative, the Court held the direction to be right, and refused to grant a new trial.

(*a*) 10 J. B. Moore, 439; S. C. 3 Bing. 117. (*b*) 3 Barn. & Adolph. 738.
(*c*) Not reported.

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Lord Chief Justice TINDAL.—The only question in this case is, whether an indenture of feoffment, which purports to have been executed by Josiah Hawkins, the tenant in fee tail of the premises in question, to his brother Robert, in 1779, and which we may assume to have had the usual effect of a feoffment, is now to be considered in full force and operation, or whether it has been superseded by a subsequent reconveyance; and, in that view of the question, it will be unnecessary to consider whether or not it operated as a discontinuance of the estate tail. Now, on looking at the facts of this case, if they had been left to a jury, I think they *might* have presumed, and further that they would have been justified in presuming, that, after the execution of the deed of feoffment from Josiah Hawkins to his brother Robert, there must have been a reconveyance of the property from the latter, the feoffee, to Josiah the feoffor, during his lifetime, and, if it were necessary to fix a time for such reconveyance, I should ascribe it to the year in which Josiah Hawkins died, namely, in 1780; and such a reconveyance would operate as a remitter to the better title; and, consequently, Robert Hawkins, the son and heir of Josiah, and grandson of Robert the feoffee, could, by law, effectually suffer the recovery of 1789, by which it was declared that the estate in question should enure to his use in fee. What then are the facts which warrant us to presume a reconveyance by Robert the feoffee in 1780? The deed of feoffment having been executed in 1779, there is no evidence whatever of any possession under it by the feoffee from the day of its date to the present time. During the life of Josiah, at least, one would have thought that the feoffment would have been accompanied with the possession of the feoffee, or that such possession would have followed the deed: but there is no such fact stated in the case; on the contrary, it appears, that, on the death of Josiah, his son Robert entered, and continued in possession till his death

in 1826, a period of forty-six years, during which, namely, in 1789, he suffered a recovery, by which the property was conveyed to himself in fee, and by which it must be assumed that he considered the estate as belonging to him. Now, if Robert the feoffee did not enter on the death of Josiah, why did he not do so in the following year? It further appears that Robert the feoffee died in 1788, having previously devised a particular dwelling-house, and all his freehold and copyhold estates, to his widow, in fee; but no mention whatever is made as to the property which it is alleged he took under the deed of feoffment. Now, if Robert the feoffee did not enter from any tenderness to his brother Josiah, we cannot presume such tenderness to have influenced his widow from claiming her rights; and yet, from the death of Robert, the feoffee, in 1788, down to 1807, when she died, and from that period to 1826, when Robert, the son of Josiah, died, no attempt was made by any person or persons claiming under her, to obtain possession of the property in question. Now, besides all this, it is a strange and singular fact that the deed of feoffment is not found in the muniment chest of the family of the feoffee, as might naturally be expected if possession had accompanied the deed; but that instrument and all the title deeds were in the possession of the family of the feoffor, under whom the lessors of the plaintiff claimed, and, from which circumstance, as strong a presumption as possible arises that the deed must have got back to the feoffor by some reconveyance of the property from Josiah the feoffee. Then, the fact of the recovery suffered by Robert, the son and heir of Josiah, in 1789, is evidence to raise a strong presumption that he considered that he had a sufficient title or estate in him to create a tenant to the præcipe. The dominion of the property, and all the acts of ownership since the feoffment, have been exercised by the family and descendants of the feoffor, as if no such instrument had been executed; whilst

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no acts of ownership whatever are stated on the part of the feoffee; and those by the feoffor, and persons claiming under him, would have been inconsistent if the deed of feoffment were now to be deemed a valid and existing instrument. Under all these circumstances, I think we may fairly presume that there was a reconveyance of the property at some period after the deed of feoffment was executed, and that such reconveyance took place about the time of the death of Josiah the feoffor, in 1780. This conclusion is consistent with the enjoyment of the property by the feoffor and his family, which appears to have remained undisturbed for the period of forty-six years, namely, from 1780 to 1826.

Mr. Justice PARK.—I shall also confine myself to the question whether, under the circumstances stated in this case, we may not presume a reconveyance of the property in dispute by Josiah Hawkins, the feoffee, to his brother Robert, the feoffor. It is true that, in cases of this nature, presumptions are matters of fact for a jury; but, on the statement of facts before us, we are called upon to decide as if we were in the situation of a jury. A direction of a Judge to a jury, that, under certain circumstances, they are *bound* to presume a reconveyance, would no doubt be incorrect; but they may be told, that, from the circumstances before them, they are warranted in presuming such a reconveyance; and, considering myself as standing in the place of a juror, I am of opinion, that, from the facts before us, a presumption fairly arises, that, after the feoffment in 1779, the property was reconveyed by the feoffee to the feoffor. All the circumstances stated in the case are as strong as they well can be in favour of such a presumption, and particularly the fact that the deed itself does not appear to have ever been out of the custody of the feoffor or his family, who remained in possession for so long a period after the execution of the instrument. It is also true that

presumptions of this description may be rebutted by evidence; but there are no facts stated in this case to rebut the presumption of a reconveyance: and it appears to me that the case of *Doe* d. *Fenwick* v. *Reed* is expressly in point, and I thought so the moment it was mentioned. There, the defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and the defendant's family had continued in possession ever since; and it was held that the original possession having been taken, not under any conveyance, the length of possession was only prima facie evidence from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants; but that it might be rebutted; and that the jury must not presume such conveyance from length of possession, unless they were satisfied that a conveyance had actually been executed. Now, in this case, there is nothing to rebut the inference or presumption arising from the long enjoyment by the feoffor and his family; and I am therefore of opinion that we, being placed in the situation of a jury, are warranted in presuming a reconveyance from the feoffee to the feoffor subsequently to the execution of the deed of feoffment, and that such reconveyance has been either lost or destroyed.

Mr. Justice GASELEE.—The cases of *Livett* v. *Wilson* and *Doe* v. *Reed* neither decide that a jury may not, nor that they are bound to presume a conveyance; but that the question in such cases is, whether, under all the circumstances before them, there is sufficient to warrant them to make such a presumption. I did not recollect the circumstances of the case of *Livett* v. *Wilson* when it was referred to in argument. But there it appears the the defendant pleaded a grant of right of way by deed, which he averred was subsequently lost; and the plaintiff in his replication traversed the grant; and, at the trial

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before me, there being conflicting testimony as to the user of the way, I told the jury that, if, upon this issue, they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that the deed had been lost, they would find for the defendant; but that, if they thought there had been no way granted by deed, they would find for the plaintiff: and, upon a motion for a new trial, the Court thought that my direction was right, as the user of the way, so far from being uninterrupted, had continually been the subject of contest. It is the duty of a Judge to state the circumstances and facts to the jury, from which they may draw their own conclusion. Here there was no evidence of enjoyment or possession by the feoffee or any parties claiming under him. The circumstances, as my Lord Chief Justice and my Brother Park have justly observed, appear to be all one way. There was no evidence whatever to shew that the deed of feoffment was ever in the possession of the feoffee: and at the trial it was produced by the lessors of the plaintiff, who claimed under the feoffor. I therefore think that these facts are sufficient to warrant us in presuming a reconveyance by the feoffee to the feoffor subsequently to the execution of the deed of feoffment.

Mr. Justice BOSANQUET.—I think the lessors of the plaintiff are entitled to recover. I do not form my opinion on the supposition of any presumption of law; for, this is a mere question of fact. The Court is placed in the situation of a jury; and I think a jury, in the exercise of a sound discretion, would have drawn the conclusion that there was a reconveyance from Robert, the feoffee, to his brother Josiah, the feoffor; and, assuming that such a reconveyance was made before the death of the feoffee, it would effect a remitter to the original estate, and the property would descend to Robert, the son of Josiah,

and his heirs; and the recovery suffered by him in 1789 was therefore sufficient to convey the estate to him in fee. The conduct of the feoffee, after the property had passed to him under the alleged deed of feoffment, and of those who claim the estate under him, must be looked at; and it is inconsistent with the supposition that he ever had possession under the feoffment, for, it does not appear that that deed was ever in his custody or in the possession of his widow or devisee, or any part of his family. On the contrary, it was produced at the trial by the lessors of the plaintiff, on notice given by the defendants to produce it as well as all the other title deeds. Besides, upon the death of Josiah, the feoffor, in 1780, Robert, his son and heir in tail, and not Robert the feoffee, entered into possession and continued to occupy the premises for forty years when he demised them to one of the lessors of the plaintiff, who held them about six years; thus making a period of forty-six years; and no claim was made on the part of the defendants till 1829, which was three years after the death of Robert, the son of the feoffor. The lessors of the plaintiff, therefore, and those from whom they derived title, had been in possession for forty-nine years, namely, from 1780 to 1829, which is altogether inconsistent with any supposed title in the feoffee. Besides, Robert, the heir in tail of Josiah, the feoffor, whilst in possession, namely, in 1789, suffered a recovery—an act inconsistent with the existence of any estate in the feoffee. On the other hand, what is the conduct of the defendants? They entered on the premises in 1829, and, upon being sued in trespass by the lessors of the plaintiff, they suffered judgment to go by default, thereby acknowledging that they were trespassers, and had no legal title to the property. Under all these circumstances, I think a jury would have been warranted in presuming a reconveyance from the feoffee to the feoffor subsequently to the deed of feoffment; and that Robert Hawkins, the son and heir of

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the feoffor, was remitted to his estate tail on the death of his father, and which he converted to an estate in fee by suffering the recovery in question.

Judgment for the plaintiffs.

Monday, June 10th.

INGLEBY *v.* MOUSLEY, SWIFT, and Another.

The condition of a bond executed by the principal and two sureties in the penal sum of 1000*l.*, contained a recital that the obligor had taken a farm of the plaintiff the (obligee), subject to the payment of rent reserved in a lease of even date with the bond, and that it had *also been agreed* by the obligor and the plaintiff, that the obligor should enter into a bond with two sureties in the penalty of 500*l.* for the due payment of the rent. Rent, having been found by a jury to be due to the plaintiff to the amount of 740*l.*, the Court refused to reduce the verdict to 500*l.*, to which only it was contended the sureties could be liable by virtue of the recital in the condition.

THIS was an action of debt on a bond executed by the three defendants, in the penal sum of 1000*l.* The condition—after reciting, that, by a certain indenture of lease bearing even date with the bond, and made between the plaintiff and the defendant Swift, the former had demised to the latter a certain farm, mills, buildings, and premises of the plaintiff, to hold to him Swift for the term of fifteen years, subject to the payment of the yearly rent of 450*l.*, and also subject to the provisoes, conditions, covenants, and agreements by Swift in the said indenture contained and expressed, and that it had also been agreed by and between the defendant Swift and the plaintiff that he, Swift, should enter into a bond or obligation in writing, *with two sufficient sureties, in the penalty of* 500*l.*, for the due payment of the rent and the true observance and performance of the conditions, covenants, and agreements in the said in part recited indenture of lease contained, and that, in case or in the event of the death, bankruptcy, or insolvency of such sureties, or either of them, he, Swift, should provide and appoint other sureties in their stead—was declared to be such, that, if the defendant Swift, his executors or administrators, should and did well and truly pay and cause to be paid the said yearly rent of 450*l.*, at the days and times and in the manner mentioned and expressed in and by the said in part recited indenture of lease, and also did and should observe, perform, fulfil, and keep all and

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singular the conditions, covenants, and agreements in the same indenture contained and expressed, and which on his or their part and behalf were or ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the same indenture of lease; that then the said bond or obligation should be void and of none effect, but otherwise should be and remain in full force and virtue.

The plaintiff in his declaration alleged, that, after the making of the said indenture in part recited in the condition of the bond, and during the term thereby granted, to wit, on the 25th December, 1831, a large sum of money, to wit, the sum of 900*l.* of the rent aforesaid, for two years of the said term ending on the day and in the year last aforesaid, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the defendant Swift by him in that behalf so made as aforesaid; by reason whereof the said bond or writing obligatory became forfeited, &c.

At the trial before Mr. Justice Alderson, at Guildhall, at the first Sittings in this term, it appeared that Mousley and the other defendant executed the bond as sureties for Swift; and, on the lease between the latter and the plaintiff being put in, it appeared to have been dated in 1819, and to have contained a covenant by Swift to perform all the provisoes and conditions therein contained on his part and behalf to be performed and fulfilled, under the penalty of 500*l.*, to be recoverable in any of the Courts of law at Westminster-Hall.

The jury having found a verdict for the plaintiff for 740*l.*, the amount of the rent proved to be in arrear from the defendant Swift to the plaintiff.

Mr. Serjeant *Goulburn*, on a former day in this term, obtained a rule nisi that the verdict might be reduced to the sum of 500*l.*, pursuant to leave reserved by

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by the learned Judge.—By the recital in the condition of the bond, it was evidently the intention of the parties to limit the responsibility of the sureties to 500*l.*, and that intent is to be collected from the lease itself, which contains a general clause of performance of all the covenants therein contained on the part of Swift, the tenant, under the penalty of 500*l.*, and the lease is in part recited in the condition of the bond. This case, therefore, falls within the terms and meaning of the statute 8 & 9 Will. 3, c. 11, s. 8, which renders it imperative on the plaintiff to assign breaches, in order that damages may be assessed accordingly and the penalty of the bond restrained to those which may actually be found to have accrued. In the case of *Lord Arlington* v. *Mericke* (*a*), where the condition of a bond was larger than the recital, the Court held that the recital restrained it (*b*); and in *Payler* v. *Homersham* (*c*), it was held that general words in a release contained in a deed have reference to the particular recital, and must be governed by it. In Bacon's Abridgment (*d*), it is said: "The sure rule and distinction seems to be, that, where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but, where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital:" and here the intent of the parties to limit the responsibility of the sureties to 500*l.*, is apparent from the recital in the condition of the bond, which corresponds with the amount of the penalty for a breach of the covenants contained in the lease.

Mr. Serjeant *Taddy* now shewed cause.—This is not a case within the statute 8 & 9 Will. 3, which does not authorize the altering the penalty of a bond or a verdict, for

(*a*) 2 Wms. Saund. 413 *a*.
(*b*) See also Id. 414 *c*, 415 *a*, n. (5).
(*c*) 4 Mau. & Selw. 423.
(*d*) Tit. "Release," (K).

it merely enacts that the judgment for the penalty shall stand or remain as a security for the damages actually due. The penalty in the bond was meant to secure the rent to become due from the defendant Swift to the plaintiff; and the jury have found 740*l.* to be due to the latter for rent. Although the recital in the condition is opposed to the penalty, yet the parties could not have intended to limit the liability of the sureties to 500*l.* The bond is the higher instrument, and the obligatory or binding part of it must be looked at by the Court; and the recital in the condition cannot have the effect of controlling or altering the penalty. The parties might have meant that the bond should be taken with two sureties in 500*l.* each; which was probably the case, considering that the rent intended to be secured was 450*l.* per annum. Although the cases of *Lord Arlington* v. *Mericke*, *Payler* v. *Homersham*, *Pearsall* v. *Summersett* (*a*), and *Sansom* v. *Bell* (*b*), have established the principle that general words in a release or in the condition of a bond, may be restrained by the recital, yet there one part of the condition was construed with reference to the other; whilst here the penalty of the bond cannot be affected by the condition, or limited or altered by the Court, as it is the obligatory or binding part of the instrument: and the plaintiff is entitled to enter up judgment for the penalty, and recover damages to the amount of the sum found to be due to him by the verdict of the jury.

Mr. Serjeant *Goulburn*, in support of his rule.—If the argument for the plaintiff were to prevail, it would authorize a party suing on a common money bond taken in the penal sum of 20,000*l.* to levy for the full amount of the penalty, although the condition might have expressed that the liability of the obligor should be limited to 1000*l.*

(*a*) 4 Taunt. 593. (*b*) 2 Camp. 39.

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only. But the bond in question is clearly within the statute of William, and the plaintiff so treated it by assigning breaches in his declaration for non-payment of the rent due. In a note to *Gainsford* v. *Griffith* (*a*), Mr. Serjeant Williams says: "The act was made in favour of defendants, and is a remedial law, calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payment of further sums than are in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued."

Here, the condition of the bond and the lease must be looked at together, and the only sum for which the sureties can in conscience be liable is 500*l.*, that being the amount of the penalty expressed in both; and the verdict may and ought to be reduced accordingly: and the Court, by so directing, will not alter the penalty of the bond, which is a mere formal part of the instrument, and is generally taken in double the amount of the sum intended to be secured. Although there is an ambiguity in the recital in the condition, yet the obvious intention of the parties was that the sureties in the bond should not be liable beyond the sum of 500*l.*, and that limitation or restriction was clearly contemplated by the introduction of the agreement between Swift and the plaintiff at the commencement of the condition. Although the amount of damages is a question to be ascertained by a jury, where the damages are unliquidated; yet here the question depends on the intention of the parties; and lease itself, as well as the recital in the condition, shews that they meant to limit the responsibility of the sureties to 500*l.*, otherwise the recital would have been wholly superfluous; and, if each of the sureties were to be liable to the amount

(*a*) 1 Wms. Saund. 58, n. (1).

of the damages found by the jury, it would far exceed the penalty of the bond; whilst the damages might have been ascertained, and limited to the sum actually due as prescribed by the statute of Anne.

Lord Chief Justice TINDAL.—The only question for our consideration in this case is, what is the meaning of the condition of the bond. The bond is taken in the penal sum of 1000*l.*, and the condition begins by reciting a lease of the same date with the bond, from the plaintiff to the defendant Swift, by which the plaintiff demised certain premises to Swift for a term of years, subject to the payment of the rent reserved, and the due performance by Swift of the covenants therein. These are concurrent covenants: and the condition then recites that it had also been agreed between Swift and the plaintiff, that he, Swift, should enter into a bond, with two sufficient sureties, in the penalty of 500*l.*, for the due payment of the rent and the performance of the covenants contained in the indenture: and the condition of the bond is, that, if the defendant Swift should pay the rent and perform the covenants contained in the lease, the bond should be void. Now, it appears to me to be obvious that the general intention of the plaintiff, as obligee, in taking the bond, was, to secure the payment of the rent and enforce the performance by Swift, his tenant, of the covenants expressed and contained in the indenture of lease referred to. The penalty of a bond is the debt at law, which, by the obligatory part of the instrument, becomes due to the obligee; and the condition attached to it is merely for the benefit of the obligor, to restrain or limit the amount of the penalty to the sum actually due, or intended to be secured. In some of the older cases, it appears, that, where the condition of a bond was insensible and impossible, or contrary to law, the obligor could derive no benefit from it, and the obligee had his remedy on the bond as a simple

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obligation; it is therefore the bounden duty of the obligor so to word the condition, or to cause the meaning and intent of the parties to be inserted therein, as to exclude the possibility of any doubt arising upon it. Here, it has been contended for the defendant, that the recital in the condition, that it had been agreed that Swift, the lessee, should enter into a bond, with two sufficient sureties, in the penalty of 500*l.*, is virtually a stipulation that the sureties shall not be liable for more than that sum; and, therefore, that the plaintiff can recover no further damages as against them. But, for any thing that appears to the contrary, that agreement might have related to some other bond, or a different transaction between the plaintiff and Swift; for, the bond in question is taken in the penal sum of 1000*l.*; and, if there be any mistake, why are we to say that it is in the penal or obligatory part of the instrument, and not in the recital? But it does not follow that the recital in the condition relates to this particular bond, for it is merely stated that it *had been agreed* between the defendant Swift and the plaintiff, that Swift should enter into a bond with two sureties in the penalty of 500*l.* Supposing, however, that it did; when we see that the agreement recited mentions a security for 500*l.*, and the penalty of the bond in question is 1000*l.*, how are we to say, that, when the lease and bond were executed, the parties had not altered their minds as to the amount of the penalty? It seems to me, therefore, that the general purport and object of the bond and condition, taken together, being to secure the payment of the rent and due performance of the covenants contained in the indenture, the condition is not satisfied by payment of rent to the amount of 500*l.*, when the jury have found a larger sum to be due and in arrear from Swift, the tenant and principal obligor, to the plaintiff. Nothing would have been more easy than for the parties to have introduced a stipulation that they should

not be liable beyond the sum of 500*l.* and, after they have executed a bond in the penal sum of 1000*l.*, I cannot so construe the condition as to say that they are now at liberty to cut it down to 500*l.*, by the mere recital in the condition of the bond of a former agreement between the plaintiff and his tenant.

Mr. Justice PARK.—I fully agree in the observations made by my Lord Chief Justice; and it appears to me that there is no inconsistency in saying that the parties might, in the first instance, have contemplated the giving a security in the penalty of 500*l.*, and that, when they came to execute the lease and bond, they might have consented that it should be increased to 1000*l.*, the penalty for which the bond is taken, and which is duly signed and sealed by the defendants. The jury have found that 74*l.* are due from the defendant Swift to the plaintiff for arrears of rent; and, as no case has been referred to precisely in point, I think it would be consistent with the justice of the case to allow the verdict of the jury to stand.

Mr. Justice GASELEE.—I have never entertained any doubt in this case. The construction put on the bond by my Lord Chief Justice and my Brother Park, is consistent with all the previous decisions; for, if the condition of a bond is restrained by the recital, the recital forms part of the condition itself: but there is no instance where the Courts have altered the penalty of the bond. If the sureties have been imposed on, they must resort to a Court of equity for relief. But the defendant Swift is tenant to the plaintiff, and could obtain no relief in equity, as he is at all events bound to pay the rent found to be due to the plaintiff, his landlord.

Mr. Justice ALDERSON.—I am of the same opinion. No doubt, general words in the condition of a bond may

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be restrained by a particular recital, but that will not affect the penalty or obligatory part of the instrument. Here, the bond was given to secure the payment of rent from Swift, the defendant, to the plaintiff; and we cannot reduce the penalty, because the condition recites an agreement between the parties to execute a bond in another penalty, which may not apply to the bond in question. This rule, therefore, must be—

Discharged (*a*).

(*a*) See *White* v. *Sealy*, 1 Doug. 49.

Tuesday, June 11th.

The plaintiff, clerk to commissioners of a local lighting and watching act, drew up a contract to be executed by the defendants, who had accepted a tender for work to be done according to certain proposals of the commissioners, one of which was that the contract should be prepared by the solicitor to the commissioners, at the expense of the contractors. The defendants, as contractors, offered to execute the contract, but refused to pay the plaintiff his charges for drawing it up, on the ground that they were unreasonable. By the local act the contract, on the part of the commissioners, was required to be signed by five or more of them, which was not done, and, by the metropolitan general paving act, the commissioners are entitled to sue or be sued in the name of their clerk:—*Held*, that the plaintiff could not sue the defendants for refusing to execute the contract in his capacity of clerk, as the contract on the part of the commissioners had not been signed by five or more of them, when tendered to the defendants, as required by the local act, and as the charges made by the plaintiff on the defendants for preparing the contract were due to him in his individual character, and not as clerk to the commissioners.

CURLING *v.* JOHNSON and Another.

THIS was an action of special assumpsit, brought against the defendants for refusing to execute a contract or agreement drawn up by the plaintiff, contrary to their undertaking so to do. The first count of the declaration stated, that the plaintiff, *clerk to the commissioners* for putting in execution a certain act of parliament made and passed in the twenty-fifth year of the reign of Geo. 3, intituled, "An act for the better paving, cleansing, lighting, and watching the streets, lanes, yards, courts, alleys, and passages, within that part of the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey, called the water-side division, and for removing and preventing nuisances and annoyances therein, &c.," in his the said John Curling's own person, complained of the defendants, who had been summoned to answer the said

plaintiff, *clerk as aforesaid*, of a plea of trespass on the case upon promises: For that whereas, before and at the time of the making of the promise of the defendants thereinafter in that count mentioned, to wit, on &c., at London, the said commissioners proposed and were desirous to cause to be done certain pavior's and mason's works thereinafter next mentioned, within the said division and limits in the said act mentioned, and certain materials to be provided in that behalf, and had published a notice of such their desire, and a certain tender, and certain proposals and conditions respecting such works, as follows: [The proposals for the contract were here set out, which it is immaterial to state, except the last condition, which was as follows]: "The contractor will be required to execute a separate contract and bond to the commissioners, in the sum of 300*l.* for the due performance of the several works, and also to find two respectable persons, to be approved by the commissioners, who will enter into bonds in the sum of 150*l.* each, by way of security for the due performance of the contract—*such contract and bonds to be prepared by the solicitor to the commissioners, at the expense of the contractor;* that, thereupon, theretofore, to wit, on &c., at &c., in consideration of the premises, it was, at the request of the defendants, agreed by and between the commissioners and the defendants, that the commissioners should employ the defendants to do and perform, and that the defendants should do and perform the said works, and find the said materials in that behalf above mentioned, subject to the said terms and conditions, and at certain rates and prices then and there agreed upon between the commissioners and the defendants; and, in consideration thereof, and that the commissioners had then and there undertaken and promised the defendants to perform the said tender and proposals and conditions in all things on the part of the commissioners to be performed; the defendants under-

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took and promised the commissioners to perform the same in all things on the part of the defendants to be performed and fulfilled; and, although the commissioners afterwards, to wit, on &c., at &c., for the purpose above mentioned, caused to be prepared such contract and several bonds as were in that count mentioned, to be respectively executed by the defendants and their sureties respectively, to wit, William Freeman and John Dickson, then and there proposed by the defendants as their sureties for the purpose last aforesaid, and approved of by the said commissioners in that behalf; such contract and several bonds then and there being to the tenor and effect agreed upon in that behalf, and divers, to wit, five of the said commissioners were at all times ready and willing to execute such contract, to wit, at London, and the commissioners then and there tendered to the defendants the said contract and bonds to be executed by them, and requested the defendants to execute the said contract and bonds to be executed by them to the commissioners: and the commissioners then and there also tendered to the said William Freeman such bond so prepared as aforesaid to be executed by him as aforesaid, and also then and there tendered to the said John Dickson such bond so prepared as aforesaid to be executed by him as aforesaid, and then and there requested the said William Freeman and John Dickson respectively to execute such two respective bonds to the commissioners for the due performance of the works and contract; and the said commissioners were always ready and willing to accept and receive such contract and bonds to be executed, and to perform and fulfil such contract in all respects on their respective parts to be performed and fulfilled, to wit, at &c.: yet the said defendants and the said William Freeman and John Dickson did not nor would, nor did nor would any or either them respectively, when so requested as aforesaid, or at any other time, exe-

cute to the commissioners, or any or either of them, or to any person or persons on their behalf, such contract in writing and several bonds so prepared as in that count mentioned, and to be executed by them respectively as aforesaid, but refused, and each of them respectively wholly neglected and refused so to do; and the said contract and several bonds were and each of them was unexecuted. The plaintiff then averred that the said commissioners then and there incurred divers great and large expenses and charges, to wit, the sum of 150*l.*, in causing the said contract and bonds to be prepared and stamped, and incidental thereto, and in endeavouring to procure the execution thereof as aforesaid by the defendants and the said William Freeman and John Dickson respectively; whereof the defendants then and there had notice, and were then and there requested by the commissioners to pay to them such sum of 150*l.*; but that the defendants to do that wholly neglected and refused, and then and there wrongfully refused in any respect to perform the said agreement, to wit at &c.; and the commissioners, by reason of the premises, had been prevented from causing the said several works to be commenced or performed, and the performance thereof had been and was thereby delayed, whereby great inconvenience and injury had been and would be sustained by the said commissioners, and they would necessary incur a much greater expense than they would otherwise have sustained in causing the last-mentioned works to be done, and were otherwise damnified, to wit, at London aforesaid. The second count was in more general terms. The defendants pleaded the general issue.

At the trial before Mr. Justice Alderson, at Guildhall, at the last Sittings in this term, the defendants' acceptance of the tender by the commissioners, as set out in the declaration, was proved; and, as it related to two different contracts for separate and distinct portions of the works to be performed by them, the plaintiff had

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prepared two separate contracts, and six bonds, viz. two for the defendants and two for each of their sureties, for which, and the stamps impressed upon them, the plaintiff had sent in his bill of charges to the defendants, amounting to 85*l.* The bill was headed as follows, "Messrs. Johnson, debtors to J. Curling." This charge the defendants refused to pay, on the ground that it was unreasonable and exorbitant, as the amount of the work contracted for was only 600*l.*; and several letters were produced from them to the plaintiff, and by him in answer, in which the defendants stated that one contract and one bond were sufficient, but that they were willing to execute the works according to the terms of the contract, on receiving the directions of the commissioners to that effect, or that they would sign the contracts and bonds as prepared by the plaintiff if he would abandon his charges. This, however, he refused to do, and stated that he considered their neglect to execute the contracts and bonds, and refusing to pay his demand, was tantamount to a refusal to complete the contract; upon which the present action was brought.

For the defendants, it was submitted that the action could not be maintained, as the plaintiff, in his character of clerk to the commissioners, could only sue on such a contract as they were authorized to enter into by virtue of the 10th section of the 25 Geo. 3, c. 23: by which it is enacted, "That the said commissioners, or any five or more of them, may, and are hereby empowered, from time to time, at any of their meetings, as occasion shall require, to contract, by deed or deeds in writing, with any person or persons, for paving, raising, sinking, altering, and keeping in repair the streets, lanes, yards, courts, alleys, and passages authorized to be paved as aforesaid, or any of them, or for repairing any highways within the said division of the said parish not under the direction of particular trustees by virtue of any act of parliament for that purpose, or for any or either of the

purposes aforesaid; which contract and contracts shall specify the several works to be done, and the prices to be paid for the same, and the time or times when the said works shall be completed, and the penalties to be suffered in case of non performance thereof; and which contract and contracts shall be signed by the said commissioners, or any five or more of them, and by the person or persons contracting to perform such works:" and the 11th section enacts, that, if such contract or contracts be not performed, the commissioners, or any two or more of them, may sue any person or persons contracting on such contract or contracts (namely, a contract under seal, and signed by five or more of the commissioners). It was also contended that a mere parol acceptance of the tender by the defendants would not authorize the plaintiff to sue in his capacity of clerk. The learned Judge, reserving the points, left it to the jury to say whether the plaintiff's charges were fair and reasonable (as to which two clerks to different paving boards had stated that they should consider nine or ten guineas a sufficient charge). It was also left to the jury to say whether the plaintiff's demand of 85*l.* for such charges was annexed by him as a condition precedent to the defendant's executing the contract; in which case, the learned Judge said their refusal to execute was justifiable, if the charges were unreasonable. The jury found a verdict for the plaintiff, damages 60*l.*

Mr. Serjeant *Spankie*, on a former day in this term, obtained a rule nisi that this verdict might be set aside, and a nonsuit entered, on the ground that the plaintiff could not sue the defendants, in his character of clerk to the commissioners, upon a supposed contract with them, as no contract had been signed by five or more of the commissioners, as required by the 10th section of the local act, 25 Geo. 3, c. xxiii.—The plaintiff's remedy, if any, was by an action against the defendants for work and labour done,

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and money paid for them, in his individual character, as the expenses of preparing the bonds on the part of the defendants and their sureties, were preliminary to the execution of the contract between the defendants and the commissioners, and no formal contract had been tendered or signed by the latter, as required by the local act. The plaintiff could not seek to enforce the contract against the defendants, until the commissioners were reciprocally bound to them, as, in the case of a proposal by the vendor to sell goods, where the contract remains in vacuo until it is executed by both the vendor and purchaser: and here there was no existing contract to authorize the commissioners to sue, nor any existing right in the plaintiff to interfere as their clerk. At all events, the plaintiff's charges were unreasonable and exorbitant; one contract and two bonds would have been sufficient, the costs of preparing which would not have exceeded nine or ten guineas, as was proved by two witnesses at the trial.

Mr. Serjeant *Andrews* now shewed cause.—He submitted—first, that there was a sufficient contract to enable the plaintiff to maintain this action against the defendants—secondly, that he was entitled to sue in his capacity of clerk to the commissioners—and, lastly, that the verdict was conformable to the evidence adduced at the trial.—Although the 10th section of the local act, 25 Geo. 3, empowers five or more of the commissioners to contract by deed to be signed by them, yet here the defendants had absolutely accepted the tender made by the commissioners, and were therefore bound to execute the contract and bonds which were prepared by the plaintiff as their solicitor or clerk, and by him tendered to the defendants and their sureties to be executed. But the general metropolitan paving act, 57 Geo. 3, c. xxix, supplies

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all defects in the local act, and the 120th section (*a*) empowers the commissioners to sue in the name of their clerk for the time being, for the recovery of any sum or sums of money due or payable by virtue of any local act of parliament; and, although by the 138th section it is enacted, that neither any act or acts of parliament relating either exclusively to the paving or repairing of the streets or public places in any parochial or other district within the jurisdiction of that act, nor any clause, matter, or provision therein contained, shall be by that clause repealed; but that the commissioners or trustees by any such local act or acts of parliament vested with the control or superintendence of the pavement of the streets, &c., in every such parochial or other district, shall retain and may exercise all and every the powers and authorities by all and every such local act and acts conferred upon them; yet here the defendants, by accepting the tender, agreed to execute a contract with the commissioners, and to pay the expenses of preparing such contract, to the

(*a*) By which it is enacted "That the commissioners or trustees, or other persons having the control of the pavements in any streets or public places in any parochial or other district within the jurisdiction of that act, may sue and be sued in the name of their respective clerk or clerks for the time being; and that all actions or suits that the said commissioners or trustees, or other persons having the control of the pavements in any streets or public places in any such parochial or other district, may at any time or times hereafter direct to be brought for the recovery of any penalty or rates, or any other sum or sums of money from time to time or at any time due or payable from or by any water or gas companies or commissioners of sewers, or any other person or persons, *due or payable by virtue of any local act or acts of parliament* relating to their respective parochial or other districts, or of that act, or for or in respect of any other matter or thing relating to such local act or acts of parliament, or to that act, *may be brought in the name of such clerk or clerks respectively for the time being* in any of his Majesty's Courts of record at Westminster, by action of debt, bill, plaint, or information, &c."

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plaintiff, as their solicitor or clerk, for whose benefit and under whose authority he acted. Although the jury found a less sum to be due to the plaintiff than the amount of his bill, it does not follow that the charges were unreasonable, and the stamps for the bonds might have been paid by the commissioners, for whose benefit alone the contracts were prepared, and which the defendants were bound to execute.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie*, in support of the rule.—Although the action is formally brought by the plaintiff in his character of clerk to the commissioners, yet in effect he seeks to recover from the defendants, under that imposing title, exorbitant charges, which he never could have recovered from the commissioners themselves, and which charges were incurred for work done and sums expended by him in preparing the contracts and bonds in his individual capacity. The commissioners never entered into or signed any contract as required by the local act, and yet it is alleged in the declaration *that they had caused such contract to be prepared*, an allegation which was not proved; nor was it proved that the commissioners had paid the plaintiff any part of the expenses incurred in preparing the securities in question. Although it has been said that the commissioners are, under the 120th section of the 57 Geo. 3, authorized to sue in the name of their clerk, yet that clause only empowers them to sue on contracts made or entered into according to the form and mode prescribed by the local act; and here no contract was executed by the commissioners, or by any five or more of them. The whole of the clauses in the general act must be looked at, and the 116th section only authorizes the commissioners to enter into contracts for certain purposes therein expressly mentioned and enumerated; and, by the 117th section, particulars of such contracts must be entered in

books, to be kept by the clerk. The 124th section only empowers two commissioners to act where no particular number is required by any local act; and here the local act requires the contract to be signed by five; and, consequently, there was no valid or binding contract on the part of the commissioners at the time the defendants and their sureties were required to execute. Although a public company may stipulate that all deeds and contracts shall be prepared and drawn by their clerk, yet they must be confirmed and ratified by the company before they can be enforced against a party who has consented to enter into such a contract. By the express terms of the proposals or conditions in the present case, the defendants, as contractors, were to pay the plaintiff, as the solicitor to the commissioners, the expenses of preparing the contracts and bonds, and were not responsible to the commissioners themselves. In the case of a mortgage or sale of lands, the mortgagor or purchaser, and not the mortgagee or vendee, is liable for the expenses of preparing the conveyance. The plaintiff, therefore, in this case, should have sued the defendants for his personal work and labour as an attorney, as the commissioners had nothing to do with the charges attending the execution of the securities in question, which were for the individual benefit of the plaintiff, and which the jury found to be unreasonable. At all events, the greater part of them were unnecessary; and the defendants could only be responsible to the plaintiff in his professional character; and, as the contract on the part of the commissioners could not be supported or enforced either under the local or the general act, the plaintiff had no authority to sue in his capacity of clerk.

Lord Chief Justice TINDAL.—It appears to me that this action, in its present form, cannot be maintained. The plaintiff, in his declaration, states himself to be suing on a contract as clerk to commissioners of a certain

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district, under an act of parliament for the better paving, lighting, and watching the streets within the district. We must, therefore, see whether he discloses such a contract as the commissioners may enter into. On looking at the 10th clause of the statute 25 Geo. 3. c. xxiii (the local act referred to in the declaration), we find that the commissioners, or any five or more of them, are empowered to contract by deed in writing with any person or persons for paving or repairing the streets within the district, which contract must be signed by the commissioners, or any five or more of them, and the person or persons so contracting to perform the several works to be done in pursuance of such contract. These, therefore, are preliminary steps, and necessary to be taken before the final execution of the contract: and the statute further requires that the contract on the part of the commissioners should be under seal (See section 5). The ground of defence is, that no such contract has ever been entered into. The expenses for which the plaintiff has sued the defendants, are expenses incurred previously to the execution of any such contract; and the contract alleged to have been prepared by the commissioners, as set out on the face of the declaration, is a mere parol contract, and is neither signed nor sealed by them, or five or more of them; for, the plaintiff has only set out the tender published by the commissioners, and the acceptance of it by the defendants, at certain rates and prices agreed upon between them and the commissioners, subject to certain proposals and conditions, one of which was, that the contractor and his sureties would be required to execute a separate contract and bonds to the commissioners for the due performance of the works, which contract and bonds were to be prepared by the solicitor to the commissioners at the expense of the contractor; and here the defendants were joint contractors. The plaintiff then goes on to allege, that, in consideration that the commissioners had undertaken and promised the de-

fendants to perform the tender and proposals and conditions, in all things on the part of the commissioners to be performed, the defendants undertook and promised the commissioners to perform the same in all things on their part to be performed. The plaintiff then averred, that, although the commissioners *caused the contract and bonds to be prepared*, to be executed by the defendants and their sureties, and five of the commissioners were ready and willing to execute such contract, and tendered it to the defendants, and requested their sureties to execute the bonds, and although the commissioners were always ready and willing to accept and receive such contract and bonds so to be executed, and to perform such contract in all respects on their part; yet that the defendants and their sureties would not execute the contract or bonds so prepared to be executed by them, but that they wholly refused so to do. The plaintiff then averred that the commissioners incurred divers expenses in causing the contract and bonds to be prepared and stamped, which the defendants refused to pay on being requested so to do: by reason of which the commissioners had been prevented from causing the several works to be commenced or performed, whereby great inconvenience had been sustained by the commissioners; and that they would necessarily incur a much greater expense than they would otherwise have sustained in causing the works to be done; and that the commissioners were otherwise damnified. Now, the first objection arises on the local act, 25 Geo. 3, which requires that the contract by the commissioners shall be signed by five or more of them, and be under seal. But it is said that the general metropolitan paving act, 57 Geo. 3, c. xxix, gives them a larger power to sue, as the 120th section enacts that all actions or suits that the commissioners may direct to be brought for the recovery of any penalty, rates, or sum of money due or payable by virtue of any local act of parliament, may be brought in the name

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of the clerk to the commissioners for the time being; and that, although a contract under seal, or signed by five or more of the commissioners, had not been entered into, the acceptance of the tender by the defendants, under the preliminary parol contract, might be made the subject of an action under that section. But that clause does not authorize a contract in any other form than that prescribed by the local act; and the actions or suits mentioned in the general act are such as may be brought for the recovery of any penalty or rates, or any other sum or sums of money due or payable by virtue of any local act, or for or in respect of *any other matter or thing* relating to such local act. There is, consequently, nothing in the 120th section of the 57th Geo. 3 which gives the commissioners power to enter into any other contract than that pointed out by the local act. It was therefore incumbent on the plaintiff to shew that this was a contract, the subject matter of which related to the local act, before he could seek to avail himself of it in his character of clerk to the commissioners. The expenses of preparing the contracts and bonds had no relation whatever to the local act, and the plaintiff should have shewn, either that the commissioners had paid him as their clerk or officer for so doing, or that they were by law liable so to do. There is no pretence for saying that they paid for the drawing up of those instruments, nor did the plaintiff adduce any proof that they had offered to pay for them; and it is clear, from the language of the proposals accompanying the tender accepted by the defendants, that the commissioners could never be liable for such payment; for, the words are, "such contract and bonds to be prepared by the solicitor to the commissioners *at the expense of the contractor*." Now, if the plaintiff, at the time the defendants' acceptance of the tender was received, was aware, as he must have been, that the contract and bonds were to be prepared at the expense of the contractors, he shews, by preparing them, that he looked to the defendants alone for

payment; and the latter, by accepting the tender, bind themselves to employ the solicitor to the commissioners to prepare the contract. This, therefore, shews that the plaintiff has no right of action against the commissioners for preparing the contract, but that his sole remedy is against the contractors. The action is in effect a simple action for work and labour, and money paid by the plaintiff for the expenses of preparing the contracts and bonds, and for which he might sue in his own name; and he cannot mix up the commissioners with or make them parties to the suit, as he well knew the relative rights and liabilities of the defendants and their sureties at the time the former accepted the tender. I am therefore of opinion that the present action has been misconceived, and that the rule for entering a nonsuit must be made absolute.

Mr. Justice GASELEE.—I am of the same opinion. The commissioners have not pursued the terms or provisions of either of the acts of parliament, for, no contract has been signed by five or more of the commissioners, nor any contract made under seal, as required by the local act. The only question then is, whether this is not essentially the action of the plaintiff, and not that of the commissioners. Now, it is only necessary to look at the heading of the bill of charges delivered to the defendants, wherein the plaintiff makes them debtors to himself. With respect to the amount of the charges for preparing the contracts, I offer no opinion; but I think it would have been sufficient to have taken one bond from the defendants and one from the sureties on each of the contracts, instead of six bonds.

Mr. Justice BOSANQUET.—I am of the same opinion. This action is professedly brought by the plaintiff, as clerk to the commissioners, under the 120th section of the general act 57 Geo. 3, c. xxix, for, the local act gives him no

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authority to sue as clerk. The question then is, whether the contract, as set out in the declaration, is such as would authorize the commissioners to sue upon it in the name of their clerk. Under the 120th section, the commissioners may sue in the name of their clerk for the recovery of any penalty, or rates, or sums due or payable by virtue of any local act, or for or in respect of any other matter or thing relating to such local act: but the right of the commissioners to sue by their clerk must be acquired in the mode prescribed by the local act. It is quite clear that the contract declared on is not a contract entered into in the manner prescribed by the local act, to which the 120th section refers, because, by that act, such a contract must be signed by five or more of the commissioners; neither is it a contract authorized by any of the clauses in the general act: and it is only necessary to refer to the 116th, 124th, and 138th sections, by the latter of which local acts of parliament are not repealed, but the commissioners may exercise all the powers conferred upon them by such acts. Perhaps, if the contract had actually been executed by the plaintiff, or an insufficient number of commissioners, they might have sued in their individual capacity as trustees for the parties really interested. But on this point it is not necessary to give an opinion, as the contract upon which the plaintiff seeks to recover was made with him as solicitor to the commissioners, and not in his public capacity of clerk; and it was incumbent on five or more of the commissioners to sign a formal contract on their parts, in order to entitle the plaintiff to sue as their clerk. This action is brought by the plaintiff in his public capacity of clerk to the commissioners, whereas it is substantially an action by which he seeks to recover for work done in his individual character: and, as it seems to me that the charges were extravagant, I do not regret to concur with the Court in thinking that the plaintiff's claim may be defeated.

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Mr. Justice ALDERSON.—I am of the same opinion. The 120th section of the general act gives power to the commissioners to sue in the name of their clerk, but it must be on such a contract as the commissioners themselves could sue upon; and here the contract set out in the declaration is not a contract of such a description, as it was neither signed by the commissioners nor sealed, as required by the local act. As, therefore, the commissioners themselves had no right to sue the defendants, neither has the plaintiff in his capacity of clerk; and I so thought when the objection was taken at the trial. The rule for entering a nonsuit must, therefore, be made—

Absolute.

DE BEGNIS *v.* ARMISTEAD.

Tuesday, June 11th.

THIS was an action on a bill of exchange, for 167*l.*, dated on the 8th February, 1832, and drawn by the plaintiff upon and directed to the defendant at Liverpool, and accepted by him, payable at Messrs. Barclay, Tritton, & Co's., bankers, London. The declaration contained a count on the bill, and the common money counts. The defendant pleaded the general issue.

The plaintiff and defendant entered into an agreement to become equal sharers in the profits to be derived from acting operas and ballets in an unlicensed theatre of the defendant's. The plaintiff having advanced sums for dresses, and for the conveyance of dancers to the theatre, at the request of the defendant:—*Held*, that the plaintiff could not recover the sums so paid; on the ground that a contract made in contravention of the provisions of a statute cannot be made the subject of an action.

At the trial before Mr. Justice Gaselee, at Guildhall, at the Sittings after the last Hilary Term, the plaintiff, a singer at the King's Theatre, in the Haymarket, sought to recover the amount of the bill from the defendant, the proprietor of a place of public amusement at Liverpool, called the Amphitheatre. An agreement in writing between the plaintiff and defendant, bearing date the 21st September, 1831, was given in evidence, by which they engaged to bring out Italian Operas and ballets for twenty

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nights at the defendant's theatre at Liverpool; and the defendant engaged to furnish every evening of the performance, after the opera, an efficient corps de ballet, and dresses for the dancers, at his own expense, and also to supply the lights and scenery, and pay the musicians in the orchestra; and the plaintiff agreed to provide the opera singers and their dresses at his expense; and it was further stipulated between the parties that the receipts or profits were to be divided equally between them on each night after the conclusion of the performance: and the plaintiff and defendant were each to have one clear benefit night.

In furtherance of this agreement, the plaintiff, at the defendant's request, paid to one Nathan 120*l.* for dresses for the dancers; and the further sum of 18*l.* to the ballet-master to defray the expense of carrying down himself and the corps de ballet which he had hired in London, to Liverpool. The plaintiff also advanced 30*l.* to the defendant to pay his expenses at an hotel in London, where he resided for a month subsequently to the making of the agreement. For these three sums the bill in question was given.

For the defendant, a clerk from the Lord Chamberlain's office was called, who proved that the theatre at Liverpool was not licensed during the period of the performances in question: and several letters between the plaintiff and the defendant were given in evidence, to shew that the plaintiff was aware of that fact, and that he also knew that the defendant had a licensed theatre at Manchester; and the defendant's daughter stated that the bill in question was given to the plaintiff on the adjustment of the balance of the partnership accounts, and that the speculation turned out to be unsuccessful.

It was submitted for the defendant that the plaintiff could not recover on the bill, as it was given for an illegal consideration, viz. the exhibition of performances at an

unlicensed theatre: and the case of *Gallini* v. *Laborie* (*a*) was relied on, where it was held that no action could be maintained for the breach of an agreement "to dance at the King's Theatre, in the Haymarket, or at such other place as the plaintiff should appoint;" it appearing that no license for that theatre had been granted by the Lord Chamberlain, as required by the statute 10 Geo. 2, c. 28, and that the plaintiff had not requested the defendant to dance at any other place which was licensed.

Under these circumstances, the learned Judge left it to the jury to say for what purpose the bill in question was given, whether for the balance of the partnership account as stated by the defendant's daughter, or in satisfaction of the three several sums alleged to have been paid by the plaintiff on the defendant's account: and he told the jury, that, if the bill was given to secure the payment of the balance of the partnership account, the plaintiff was not entitled to recover, the theatre being unlicensed at the time of the performances in question.

The jury found that the bill was given for the sums paid by the plaintiff on the defendant's account, and returned a verdict for the plaintiff for the amount of the bill.

Mr. Serjeant *Ludlow*, in the last term, obtained a rule nisi that this verdict might be set aside, as being contrary to evidence, or that it might be reduced to 30*l*., the sum paid by the plaintiff on account of the defendant's expenses at the hotel in London—the two other sums having been advanced in pursuance of an illegal agreement for dramatic performances at an unlicensed theatre.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie*, on a former day in this term shewed cause.—The jury did not attach any credit to the statement made by the defendant's

(*a*) 5 Term Rep. 242.

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daughter, that the bill was given to secure the balance due to the plaintiff on the winding up of the partnership accounts. The plaintiff, a foreigner, was invited by the defendant to join him in a speculation at his theatre at Liverpool; and it is not to be assumed that the plaintiff knew it was an unlicensed theatre at the time the agreement was entered into. The consideration for the bill consisted of three distinct sums paid on the defendant's account, and which he was bound to repay independently of the contract; and therefore the plaintiff was entitled to recover on the money counts. The agreement must be taken to be the phraseology of the defendant; and, as he had a theatre at Manchester which was licensed, the dresses for the dancers might have been used there, as well as at Liverpool. The payment therefore was made for the defendant's use, and must be considered as if the plaintiff had made the advance to the defendant himself. In *Gallini* v. *Laborie*, the action was brought *by the party* who was guilty of the illegality, as he himself was conducting the unlicensed theatre, and therefore could not enforce a contract against a person whom he called upon to violate the law; and here the defendant must have known that he was guilty of a breach of the law when he solicited the plaintiff to enter into the agreement. If the dresses in question had been used by persons practising the art of tumbling, the case would not have fallen within the provisions of the statute—*The King* v. *Handy* (*a*); and, as it does not appear that they were returned by the defendant, and were purchased for his use, he is clearly liable for the sum paid for them by the plaintiff to Nathan. The agreement was entered into on the 21st September. The defendant might have obtained a license for his theatre at the ensuing Michaelmas Sessions (*b*); and the plaintiff had no means of knowing that he had omitted to do so.

(*a*) 4 Term Rep. 286.

(*b*) See the statute 28 Geo. 3, c. 30.

Mr. Serjeant *Ludlow*, in support of his rule.—With respect to the sums of 120*l.* advanced by the plaintiff for the dresses to be used by the dancers, and 18*l.* for the conveyance of the corps de ballet to Liverpool, it is quite clear that such advances were made in pursuance of the terms of the agreement, which is illegal and void; and, as the plaintiff had a part interest in the conducting an unlicensed theatre, he cannot be entitled to recover on the bill in question, nor on the money counts; and it is most probable that the bill was given for the balance due to the plaintiff on the partnership account, as stated by the defendant's daughter. The case of *Gallini* v. *Laborie* is expressly in point to shew that this action cannot be maintained.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court.—We can entertain no doubt that the agreement between the plaintiff and defendant, bearing date the 21st September, 1831, was an illegal agreement. It was an agreement to become equal sharers in the profits to be derived from acting operas and ballets at a theatre not licensed according to the provisions of the statutes, 10 Geo. 2, c. 28, and 28 Geo. 3, c. 30; and, from the language of part of the agreement, we can feel no doubt but that it was known to both parties, at the time of entering into it, that any exhibition in such unlicensed theatre was a breach of the law. If, therefore, the bill of exchange had been given for the share of profits claimed by the plaintiff, or for the excess of advances made by the plaintiff on account of such illegal partnership, it is clear, upon the authority of *Mitchell* v. *Cockburne* (*a*), that the plaintiff could recover no part of his demand. But it is contended by the plaintiff, that, the jury having expressly

(*a*) 2 H. Blac. 379.

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found that the bill of exchange was given in respect of three distinct payments made by the plaintiff, the bill of exchange may be left out of view altogether; and that the sums so paid may be recovered under the money counts. The question, therefore, is, whether these payments were made under circumstances which will enable the plaintiff to recover all or any of them upon the money counts. The principle by which the present case is to be decided, is that which is very clearly expressed by Lord Chief Justice Holt, in *Bartlett* v. *Vinor* (*a*)—"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." The same principle is more briefly expressed by Lord Ellenborough in *Langton* v. *Hughes*(*b*): "What is done in contravention of an act of parliament, cannot be made the subject matter of an action." Now, as to one of the sums, viz. the 18*l.*, it appeared in evidence that the ballet-master, when in London, applied to the plaintiff, at the request of the defendant, to advance a sum of money on the credit of the defendant, to pay the expense of carrying down the ballet-master, and the company which he had hired, from London to Liverpool. This sum the plaintiff accordingly advanced to the ballet-master. As the defendant had, by the terms of the agreement, engaged to furnish every evening of the performance, after the opera, a ballet of good and efficient dancers at his expense, this sum of money paid for the express purpose of conveying them down to the place where the illegal exhibition was to be made, appears to us to fall within the principle above laid down. Again, as to the sum of 120*l.*, the plaintiff, at the request of the defendant, paid that sum to Nathan, for dresses purchased of him for the very

(*a*) Carth. 252. (*b*) 1 Mau. & Selw. 596.

purpose of being used by the dancers in the unlicensed theatre. It is true that the defendant had also a licensed theatre at Manchester; and that the dresses would in all probability be, and in fact were, used in both the theatres. But we cannot, upon the evidence, doubt that the object and purpose of the plaintiff in paying for the dresses, was, not to assist the defendant in preparing for his own theatre at Manchester, in which the plaintiff had no interest, but to assist in carrying into effect the illegal contract between himself and the defendant, of sharing in the profits of the unlicensed theatre at Liverpool. This sum therefore appears to us to fall within the same rule as the former. But, as to the remaining sum of 30*l.*, the only evidence is, that the defendant had borrowed that sum of the plaintiff to pay his expenses at an hotel in London, where the defendant was residing in the month next after the agreement was made. It seems therefore to us, that there is no ground for holding this money to have been advanced for the necessary purpose of carrying the agreement into execution; and therefore, as to this sum, we think the verdict ought to stand.

Rule absolute, to reduce the verdict to 30*l.* (*a*).

(*a*) See Burn's Justice, title "Players."

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To an action on a replevin bond, entered into by the tenant and two sureties, upon a distress for rent, the sureties pleaded that the replevin suit, whilst pending, was referred to an arbitrator, without any notice to or consent of the sureties; that, after enlarging the time, he made his award; and that the sureties were thereby discharged from their obligation: —*Held*, that the plea was bad on demurrer, as the facts therein stated could not be pleaded as a bar to the action, as they amounted to a part discharge only, and that the only plea of discharge from the performance of the condition of the replevin bond would be a plea of a discharge by a writing under seal.

ALDRIDGE *v.* HARPER, ALLEN, and FEIST.

THIS was an action of debt upon a replevin bond, brought by the plaintiff, sheriff of Sussex, against the defendant Harper and his two sureties, on a bond given by them on a distress of Harper's goods for rent in arrear from him to one Coppard, his landlord. The plaintiff in his declaration set out the bond and condition, by which it was declared, that, if Harper appeared at the next county court, and prosecuted his suit with effect and without delay against Coppard for taking his goods, and made a return of the goods and chattels mentioned in the condition, in case a return should be adjudged, then the bond should be void. The plaintiff then alleged that the plaint was removed into this Court by a writ of certiorari, and that the Court gave judgment that the defendant Harper and his pledges should be in mercy, and that Coppard should have a return of the goods; and that Harper did not prosecute his suit with effect, whereby the bond became forfeited to the plaintiff as sheriff. The three defendants pleaded jointly—first, non est factum; and the defendants Allen and Feist then pleaded—secondly, that, after the making of the plaint by Harper, and the taking by the plaintiff from the defendants the said supposed bond, as in the declaration mentioned, and before the obtaining the supposed judgment by Coppard against Harper as therein also mentioned, to wit, at the Assizes held at Horsham, in and for the county of Sussex, on the 23rd of March, 1829, one Richard Thornton, the defendant Feist, and one Charles Feist, stood charged by a certain indictment theretofore found against them with having assaulted one James Bartlett; and also at the same assizes three several causes, that is to say, a certain cause wherein John Doe, on the demise of the said Thomas Coppard, was plaintiff, and Richard Thornton was defen-

dant, then depending in the Court of King's Bench; a certain other cause, wherein one John Gates was plaintiff and the said Richard Thornton defendant, then also depending in the said last-mentioned Court; and a certain other cause wherein the said defendant John Harper was plaintiff and the said Thomas Coppard was defendant, then depending in the Court of Common Pleas, came on to be tried; and thereupon a certain order of Nisi Prius was then and there made in the matter of the said indictment, and in the said several causes, whereby it was ordered by the Court, by and with the consent of the parties, their counsel and attornies, that a verdict of guilty should be entered against the said Richard Thornton upon the said indictment, and that the jury should be discharged from giving any verdict therein against the said defendant Feist and the said Charles Feist; and that, in the cause wherein John Doe, on the demise of the said Thomas Coppard, was plaintiff, and the said Richard Thornton was defendant, a verdict should be entered up for the said John Doe, damages 1*s.*, costs 40*s.*; that, in the said cause wherein the said John Gates was plaintiff, and the said Richard Thornton defendant, a verdict should be entered up for the said John Gates, damages 1000*l.*, costs 40*s.*; that, in the said cause wherein the said now defendant John Harper was plaintiff, and the said Thomas Coppard defendant, a verdict should be entered up for the said John Harper, damages 4*l.* 4*s.*, costs 40*s.*: but that such verdicts should be subject to the award, order, arbitrament, final end, and determination of T. J. P., Esq., barrister at law, who was by the said order of Nisi Prius empowered to direct that verdicts should be entered for the prosecutors, plaintiffs, and defendants therein, as he should think proper; and to whom it was by the said order of Nisi Prius referred to settle all matters in difference at law or in equity between all and either of the said parties, and to order and determine what he should think fit to be

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done by all, any, or either of them respecting the matters in dispute, who agreed to be bound and concluded by such determination, and to remain contented and satisfied therewith—so as he, the said arbitrator, did make and publish his award in writing concerning the premises on or before the fourth day of the then next Easter Term: and it was by the said order of Nisi Prius also ordered *by and with the like consent, that the arbitrator might from time to time enlarge the time for making his said award,* in case he should think fit to do so: And the said defendants Allen and Feist further said, that the said agreement and submission to reference and order of Nisi Prius were then and there made without the knowledge, privity, or consent of, or any notice given to, the said defendants Allen and Feist; and that, by certain memoranda in writing by the said arbitrator made at the foot of the said order, the time for making his said award was duly enlarged until the 1st of March, 1832; and that he the arbitrator, within that time, to wit, on the 3rd of January, 1832, at &c., having assumed the burthen of the said arbitration, and heard, examined, and considered the several allegations and proofs of the said parties respectively, did make and publish his award in writing of and concerning the matters so as aforesaid referred; and, as to the said cause in which the said John Harper was plaintiff and Thomas Coppard defendant, he the arbitrator thereby then and there found and adjudged that the said John Harper was not entitled to recover therein against the said Thomas Coppard; and directed that the verdict so as aforesaid entered therein should not stand, but that instead thereof a verdict should be entered generally for the said Thomas Coppard; finding the amount of rent in arrear 40*l.*, and the value of the goods distrained and replevied to amount to the like sum; and that they the said defendants Allen and Feist thereby were wholly discharged from their said supposed obligation.

To this plea the plaintiff demurred specially, assign-

ing for causes—that the defendants had not traversed, or denied, or attempted to put in issue, any matter of fact alleged by the plaintiff in his declaration, but had introduced and attempted to put in issue matters of fact not alleged nor necessary to be alleged by the plaintiff in his declaration as aforesaid; and also that the defendants Allen and Feist had not by or in their said last plea alleged or shewn any matter of fact in avoidance of the said bond or writing obligatory made and executed by the defendants Allen and Feist as aforesaid, nor shewn themselves to be in any manner discharged from the said bond or writing obligatory, either by the payment of the sum of money mentioned in the said bond, or by the performance of the conditions thereof; and also that the said last-mentioned plea consisted altogether of matter which did not answer or avoid the said declaration of the plaintiff, and upon which no apt or material issue could be taken; and also that the said last plea was in other respects insufficient and informal, &c.

The defendants joined in demurrer; and the point submitted for them to the Court was, that the last plea disclosed sufficient matter upon the face of it to discharge the sureties on the bond, the replevin suit having been referred to arbitration without their knowledge or consent, and the arbitrator having enlarged the time for making his award—thereby giving time to the principal. The demurrer came on for argument on a former day in this term.

Mr. Serjeant *Wilde*, for the plaintiff, and in support of the demurrer.—The plea by the sureties is bad, and cannot be supported at law. The condition of the replevin bond is, that Harper, the principal obligor (the plaintiff in replevin), should prosecute his suit with effect and without delay; and the plaintiff in his declaration avers that he did not do so, whereby the bond became forfeited to the plaintiff as sheriff; and it appears on the face of the plea, that

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the cause went down to trial, and was referred with the consent of the parties to the suit, and that the arbitrator directed a verdict to be entered for the avowant (the defendant in replevin). In *Moore* v. *Bowmaker* (*a*), it was expressly decided by this Court that sureties on a replevin bond are not discharged by a reference of the replevin suit to an arbitrator; and, when that case afterwards came before the Court on demurrer to a plea, that, before the judgment was obtained, all matters in difference were referred to arbitration, pending which the proceedings were stayed, Lord Chief Justice Gibbs observed (*b*)—"It is difficult, in looking through the facts which are alleged in this plea, to see any one of them which does not operate in favour of the sureties." When that case first came before the Court of Exchequer, the application was for an injunction, on the equityside of the Court (*c*); and, when the cause was finally heard on the merits (*d*), Lord Chief Baron Richards granted the injunction to stay the proceedings at law, on the ground that it affected the conscience of the obligee, and therefore operated to discharge the sureties. Although in *Archer* v. *Hale* (*e*) it was held that the sureties were discharged by an agreement between the plaintiff and defendant in replevin to refer the cause to arbitration without the knowledge or concurrence of the sureties; yet that was a summary application to the equitable jurisdiction of the Court, upon affidavits; and the parties in the replevin suit had agreed *that the bond should stand as a security* for such sum as should be found to be due, which, as Mr. Justice Park, in delivering the judgment of the Court, observed, was most material, as upon those words much of the decision would depend (*f*). In *Hallet* v. *Mount-*

(*a*) 2 Marsh. 81; S. C. 6 Taunt. 379.

(*b*) 2 Marsh. 397; S.C. 7 Taunt. 104.

(*c*) 3 Price, 214.

(*d*) 7 Price, 223.

(*e*) 1 Moore & Payne, 285; S. C. 4 Bing. 464.

(*f*) 1 Moore & Payne, 290.

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stephen (*a*), where a declaration in debt by the assignee of a surety bond in replevin set out the condition, which was, that "if B. appeared at the then next county court, and there prosecuted his suit without delay against I., the bond was to be void;" and then the plaintiff averred that B. did did not appear, &c.; and the defendant (among other pleas) pleaded that B. did appear at the then next county court, and prosecuted his suit, &c., and which said suit was *still depending and undetermined:* it was held that an agreement (which was made a rule of Court) between the plaintiff and the principal in the bond, to stay all the proceedings in the replevin suit, upon payment by the latter of a certain sum of money, and each party to pay his own costs, was admissible evidence to negative the allegation in the plea, that the suit was still *depending and undetermined;* and that the surety was not discharged by such agreement after breach by the principal, but was liable for such sum as appeared upon a reference to be due: and the Court said, "that the objection that the surety was discharged by the agreement with the principal, did not apply to a bond of this description." Here, the object of the parties was to prosecute the suit, and no intentional delay can be attributed to Harper (the principal in the bond, and plaintiff in replevin), as the cause went down to trial; and, as it was referred by the mutual consent of the original parties to the suit, the determination of the arbitrator was final. The order of reference contained no stipulation as to time; and, although the arbitrator enlarged the time for making his award, yet he might have decided within the period which was first mentioned in the order, by which all matters in difference at law or in equity between the parties were referred. The arbitrator, therefore, in such a case, must be considered as an officer of the Court; and his merely enlarging the time for making

(*a*) 2 Dow. & Ryl. 343.

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his award, cannot have the effect of discharging the sureties. If the cause had gone to the jury, and a rule had been granted for a new trial, some delay must necessarily have taken place before the rule could have been disposed of; and yet that could not be said to be a delay or voluntarily giving time to the principal, so as to operate in discharge of the sureties. The object of the reference was, that the suit might be prosecuted and brought to a legal determination. The enlargement of the time by the arbitrator was not by way of indulgence, and may be assimilated to a case where the Court gives a party time to plead. As the order of reference is a mere interlocutory proceeding, it was discretionary in the arbitrator to enlarge the time for making his award as circumstances might require; and, as the sureties have failed to shew that their relative situation with their principal has been changed, the plea is ill, and affords no answer to the action.

Mr. Serjeant *Talfourd*, contra.—Although the plaintiff has averred in his declaration that this Court has by its judgment decided that the defendant Harper did not prosecute his suit with effect, whereby the replevin bond became forfeited to the plaintiff; yet that judgment is not conclusive on the sureties, who may be discharged by collateral circumstances, namely, by a discharge of, or time given to, their principal; and consequently they are not estopped from pleading their discharge by a reference of the replevin suit without their knowledge or consent; and here it is averred that they had not even any notice of the reference, which was not only a delay of the proceedings, but might place them in a worse situation, as the effect of the reference was to give time to their principal, who might become bankrupt or insolvent before the arbitrator had made his award; and, as he enlarged the time, there was in fact a considerable delay. Although, in *Moore* v. *Bowmaker*, this Court held that the plea by the sureties was

ill, as no prejudice could arise to them from the delay, yet the Court of Exchequer afterwards granted a perpetual injunction to restrain the defendant from proceeding against the surety, on an assignment of the replevin bond: and that case was recognized and adopted as an authority by this Court, when Mr. Justice Park pronounced judgment in *Archer* v. *Hale*, which is precisely in point to shew that the sureties are entitled to their discharge, at law as well as in equity, where their principal has agreed to refer the replevin suit without their knowledge or *consent*. The enlargement of the time by the arbitrator may be considered as if the parties to the suit had agreed to extend it, as he was impowered to do so by the order of reference, and, as it was done without the consent of the sureties, it is quite clear that it operated their discharge. The proceedings before an arbitrator are wholly different from those at Nisi Prius, as he may examine the submitting parties, which cannot be considered as the ordinary mode of prosecuting a suit; and here the condition of the bond was that Harper should prosecute his suit with effect and *without delay*. Besides, this was not a reference in the ordinary course, for, one of the matters referred was a bill of indictment which had been preferred against third persons, who were no parties to the suit. The arbitrator was empowered to exercise a legal as well as an equitable jurisdiction, and the sureties might be prejudiced by his determination: at all events, they were damnified from the length of time which had elapsed before he made his award.

Mr. Serjeant *Wilde* was heard in reply.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—This is an action of debt upon a re-

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plevin-bond, brought by the sheriff of the county of Sussex against the tenant and his sureties. The plaintiff in his declaration set out the bond and the condition, by which it was declared, that, if Harper appeared at the next county court and prosecuted his suit with effect, and made a return of the goods and chattels mentioned in the condition, in case a return should be adjudged, then the bond should be void; and then alleged that Harper did not prosecute his suit with effect, but that there was judgment against him in the replevin suit, and that a return of the goods and chattels was adjudged to the avowant. The defendants first pleaded non est factum, and the two sureties then pleaded, secondly, that the replevin suit, whilst pending, was referred, under an order of Nisi Prius, to the award of an arbitrator, without any notice to or consent of them, the sureties; and that the arbitrator, after enlarging the time, made his award, directing the verdict to be entered for the avowant, and finding the amount of the rent in arrear, and the value of the goods distrained; and the plea then concluded that the defendants Allen and Feist, the sureties, were thereby discharged from their said obligation. To this second plea there was a demurrer and joinder in demurrer.

The first point made on the argument on the part of the defendants was, that they, being sureties, were discharged by reason of time being given to the principal. But we are all of opinion, that, although the circumstances stated in the plea might have the effect of discharging the sureties in a Court of equity, or upon an application to the equitable jurisdiction of the Court (*a*) upon a summary application on some collateral point, yet

(*a*) See *Dale* v. *Gordon*, ante vol. 2, p. 532. In an action *against the sheriff* for taking insufficient pledges in a replevin-bond, the Court refused to stay the proceedings, on an affidavit that the cause was referred without the consent of the sureties, *that being matter of defence at the trial.*

that these facts could not be pleaded as a bar to the action, inasmuch as they amount to a part discharge only. This is an action of debt upon bond; and the only plea of discharge from the performance of the condition must be, a plea of such discharge by a writing under seal. In *Hayford* v. *Andrews* (*a*), it is laid down that it is no plea to debt on bond that the plaintiff agreed to give a longer day for payment; and the case of *Davey* v. *Prendergrass* (*b*) is an express authority that a parol agreement to give time to the principal without the consent of the surety is no bar at law to an action of debt upon bond against the surety. And, as to the case of *Archer* v. *Hale* (*c*), which was relied upon by the defendants in argument, as a judgment of this Court that the sureties should be discharged where time was given to the principal without their consent, the answer is a very obvious one—that the application to the Court in that case was an application by motion, and that it appeared, upon the affidavits laid before the Court, that it would be against equity to allow the sureties to remain liable; whereas the Court are now called upon to declare their judgment on the legal effect of a plea. When, therefore, we determine that the present plea cannot be supported, we do not in the least impeach the judgment given by the Court in *Archer* v. *Hale*. The case of *Donnelly* v. *Dunn* (*d*) is in point as to the distinction between using the same state of facts as a plea and as an application to the equitable jurisdiction of the Court.

Judgment for the plaintiff.

(*a*) Cro. Eliz. 697.
(*b*) 5 Barn. & Ald. 187.
(*c*) 1 Moore & Payne, 285; S. C. 4 Bing. 464.
(*d*) 2 Bos. & Pul. 45.

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Wednesday, June 12th.

A bond was executed on the 17th March, 1827, in the penalty of 10,000*l.*, conditioned for the payment of 5,000*l.*, on the 17th March, 1829, with interest in the mean time payable half-yearly, pursuant to the provisoes and stipulations contained in an indenture of assignment of even date with the bond. The defendant, after craving oyer of the bond and condition, pleaded payment according to the condition of the bond and of the provisoes in the indenture; which the plaintiff denied in his replication. The principal and interest having become due before the action was commenced:—*Held*, that it was not necessary for the plaintiff to assign breaches under the stat. 8 & 9 Will. 3, c. 11, s. 8.

SMITH and Others *v.* BOND.

THIS was an action of debt on a common money bond executed by the defendant on the 17th March, 1827, in the penalty of 10,000*l.* The defendant, after craving oyer of the bond and condition, pleaded that the said supposed writing obligatory in the declaration mentioned, was made and executed by the defendant, together with one W. V., one W. M., one J. D., one J. W., and one A. P. G., under and subject to certain conditions thereunder written; that is to say, that, if W.V., W. M., J. D., J. W., the said defendant, and A. P. G., their heirs, executors, or administrators, or any one or more of them, did and should well and truly pay or cause to be paid unto the plaintiffs, their executors or administrators, the sum of 5,000*l.* sterling money of Great Britain, on the 17th March, 1829, and did and should in the mean time and in like manner pay or cause to be paid to the plaintiffs interest for the said sum of 5,000*l.*, at and after the rate of 5*l.* per cent. per annum, by half-yearly payments, on the 17th September and the 17th March in each and every year, without any deduction or abatement for taxes or on any other account whatsoever—the first of such half-yearly payments to become due on the 17th September next ensuing the day of the date of the said bond or obligation; then and in such case the said bond or obligation should be void, otherwise the same should be and remain in full force and virtue: Provided, nevertheless, and it was thereby declared that the said principal sum of 5,000*l.* and interest secured by the said bond included and was identical with the several principal sums of 2,500*l.* and 2,500*l.*, and interest, secured by, and was *subject and governed*, as well as to the time or times of payment, as in all other respects whatsover, *to and by the provisoes, conditions, stipulations, and agreements contained in a certain indenture of assignment bearing*

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even date with the said bond or obligation, and made, or expressed to be made, between the plaintiffs, the defendant, and W. M., J. D., &c., and duly stamped with the proper ad valorem duties in respect of the said principal moneys: Provided always, and it was thereby further conditioned and declared, that each of them the said W. M., J. D., J. W., the defendant, A. P. G., and his and their respective real and personal representatives, should be considered severally liable to answer in damages by virtue of the said bond or writing obligatory only to the extent of the sum of 1,000*l.*, and the proportion of the interest for the time being due in respect of that sum, and without reference to any former or other payment or payments whatsoever, until the whole of the said principal sum of 5,000*l.* and interest thereby secured should be discharged; and that, notwithstanding any judgment which should or might be obtained against the said obligors, or the survivors of them, jointly, or against any of them the said obligors (except the said W. M.) severally, by virtue of the said bond, no execution or other process should be issued, so as to charge the person or estate, or real or personal representatives of any one of them the said W. M., J. D., J. W., the defendant, and A. P. G., with the levying of any sum or sums of money exceeding in amount the sum of 1,000*l.*, and a like proportion of the arrears of interest for the time being due on the said bond, and the costs incident thereto: as by the said supposed writing obligatory, reference being thereunto had, would more fully and at large appear. The defendant then averred that he did well and truly pay and cause to be paid to the plaintiffs the sum of 5,000*l.* sterling money of Great Britain, in the said condition mentioned, on the 17th March, 1829, and did also in the mean time and like manner pay and cause to be paid to the plaintiffs the proportion of interest for the time being due in respect of that sum, and without reference to any former or other payment or payments whatsoever, at and after the rate of

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5*l.* per cent. per annum, by half-yearly payments, on the 17th September and 17th March in each and every year, without any deduction or abatement for taxes or on any other account whatsoever, according to the tenor, effect, true intent, and meaning of the said condition of the said writing obligatory, and of the said several provisoes, conditions, and agreements in the said condition of the said writing obligatory mentioned, *and according to the provisoes*, conditions, stipulations, and agreements contained in the said indenture of assignment in the said condition of the said writing obligatory mentioned.

Replication, that the defendant did not pay the said sum of 5,000*l.* and interest, or any part thereof, in manner and form as in the above plea alleged, on which issue was joined.

At the trial before Mr. Justice Alderson, at Guildhall, at the Sittings in this term, the defendant having offered no evidence of payment, the jury found a verdict for the plaintiffs, to the amount of the penalty of the bond, with one shilling damages for the detention of the debt.

Mr. Serjeant *Goulburn*, on a former day in this term, obtained a rule nisi for arresting the judgment, on the ground that, the bond being conditioned for the performance of covenants in an indenture bearing even date with the bond, it was imperative on the plaintiffs to have assigned or suggested breaches, according to the provisions of the statute 8 & 9 Will. 3, c. 11, s. 8.—There was no plea of non est factum on the record; and although the statute enacts that the plaintiff *may* assign breaches, yet that word has been construed as *must*, and that it is *compulsory* upon him to do so—*Gainsford* v. *Griffith* (*a*). The result of all the decisions on this clause of the statute is, that, where a bond is conditioned for the performance of a single act,

(*a*) 1 Wms. Saund. 4th edit., 58, n. 1; Tidd's Pract. 9th edit. 584.

or payment of a definite and certain sum at a given day, it is not within the statute; but that, where covenants and agreements are contained in the condition, they are within the statute, as well as where they are in a different instrument; and, therefore, a bond conditioned for the payment of a certain sum by instalments has been held to be within the act—*Willoughby* v. *Swinton* (*a*): and here the principal sum was not payable until the expiration of two years from the date of the bond, with interest in the mean time. Besides, the indenture as set out in the condition restrains the liability of the five obligors to 1,000*l.* each. The cases of *Hardy* v. *Bern* (*b*) and *Roles* v. *Rosewell* (*c*) are decisive to shew that a plaintiff cannot proceed at common law by entering up judgment for the penalty, but must suggest breaches according to the statute, on which damages are to be assessed. In *Ethersey* v. *Jackson* (*d*), it was held that the plaintiff might enter a suggestion on the roll, and assign breaches, after oyer of the condition and plea of non est factum, on which issue was joined, and notice of trial given. In *Vansandau* v. —— (*e*), where a bond was conditioned for the payment of a principal sum in a given year, namely, in 1820, with interest in the mean time half-yearly, an action having been brought for the penalty upon breach of the condition in nonpayment of half a year's interest on the 29th September, 1817, the Court refused to stay the proceedings before judgment, on payment of the interest and costs, although the nonpayment of interest was owing to an inadvertence on the part of the defendant; and held the plaintiff to be entitled to judgment for the whole penalty. *Hankin* v. *Bromhead* (*f*) is an authority to shew that a bond conditioned for the payment of money at a distant period, is within the act; and in *Hurst*

(*a*) 6 East, 550.
(*b*) 5 Term Rep. 540, n., 636.
(*c*) 5 Term Rep. 538.
(*d*) 8 Term Rep. 255.
(*e*) 1 Barn. & Ald. 214.
(*f*) 3 Bos. & Pul. 607.

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v. *Jennings*, Lord Chief Justice Abbott said (*a*) that the statute 8 & 9 Will. 3, c. 11, s. 8, *required* plaintiffs to suggest breaches in all actions upon bonds conditioned for the performance of covenants and agreements; and that it was a very wholesome act of parliament.

Mr. Serjeant *Storks* shewed cause.—It may be admitted that it is compulsory on the plaintiff to suggest breaches in the mode prescribed by the statute of William, where the case falls within the provisions or operation of that act. Here, the defendant might have pleaded the indenture, and averred performance of the covenants therein contained; instead of which he confined himself to the fact of payment of the principal and interest, according to the condition of the bond. Although bonds conditioned for the payment of an annuity, or of money by instalments, have been held to be within the statute, yet its provisions do not extend to post obit bonds, or other bonds conditioned for the payment of money which are provided for by the statute 4 Anne, c. 16; nor to bail bonds, as the Court may in such cases relieve defendants by virtue of its equitable jurisdiction. Here, the condition of the bond and the covenants in the indenture all relate to one and the same transaction, namely, the payment of the sum secured; and the Court will not infer covenants or provisoes distinct from the subject matter for which the bond was given, and which is apparent on the face of the condition. The debt and arrears of interest were due long before the present action was commenced. In the cases referred to, either the principal sum secured by the bond was not due, or the covenants to be performed did not relate to the mere payment of money, as in the present case. The Court, therefore, may restrain the execution as against the defendant to the sum of 1,000*l.* and the interest

(*a*) 5 Barn. & Cress. 675.

due thereon, and the damages may be assessed accordingly. But the case of *Cardozo* v. *Hardy* (*a*) appears to be precisely in point. There a bond was conditioned for the payment of a certain sum on or before a stated day, or within one month after the decease of the obligor, whichever period should first happen, together with interest for the same at the rate of 5*l.* per cent. in the mean time. In an action on the bond against the executors of the obligor, the Court held that it was not necessary to suggest breaches on the record, as the condition of the bond was to pay a certain sum within one month after the decease of the obligor. In *Murray* v. *The Earl of Stair* (*b*), it was held that a post obit bond (upon which a forfeiture had taken place) was not within the statute, and consequently that it was not necessary to suggest breaches thereon; and Mr. Justice Bayley said that he was of opinion that the case fell within that of *Cardozo* v. *Hardy*, which was properly decided; and Mr. Justice Holroyd said: "The statute 8 & 9 Will. 3 seems to have contemplated bonds by the condition of which more than one act was required to be done." Here, however, only one act was required to be done, namely, the payment of the principal sum mentioned in the condition, with interest on the days and at the periods therein stated; and, as the principal and all arrears of interest were due before the commencement of the present action, execution might be sued out, and the amount easily ascertained, as being due from the defendant, without requiring the judgment to stand as a security.

Mr. Serjeant *Goulburn*, in support of his rule.—The statute of William being highly remedial, and passed with the express view of relieving defendants from the payment of more than is justly due, has always received a liberal

(*a*) 2 J. B. Moore, 220. (*b*) 2 Barn. & Cress. 82.

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construction; and the Court will raise no inference in favour of a party suing upon a bond, and seeking to enforce the penalty; and here, as the bond was taken in the penalty of 10,000*l.*, and the liability of each of the obligors is by the deed restrained to the payment of 1,000*l.*, and the condition expressly refers to an indenture of assignment and the performance of covenants, which instrument bears even date with the bond, the case is clearly within the provisions of the statute; and, as the verdict has been taken for the amount of the penalty, it is erroneous and cannot be sustained. In *Hardy* v. *Bern*, where the plaintiff assigned breaches under the statute, but the jury did not assess the damages, the Court said: "It is apparent to us that the law was made in favour of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than what was in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only had accrued." The true distinction is, that, where several acts are to be performed at different times, the case falls within the provisions of the statute; and, if once brought within the act, the plaintiff must pursue the course there pointed out. In *Murray* v. *The Earl of Stair*, Mr. Justice Holroyd said, "He did not mean to pronounce his judgment upon the ground that the statute of William was not intended to apply to any case but where one thing is required to be done by the condition of the bond; for, it is perfectly clear, that, if a bond be within the 4 & 5 Anne, c. 16, it is not within the statute 8 & 9 William 3, c. 11:" and that learned Judge founded his opinion on the circumstance that the bond before the Court was within the words and spirit of the statute of Anne, which it certainly was, as it was a post obit bond, conditioned for a single act only, namely, the payment of 2,000*l.*

six months after the death of Lord Stair; and therefore the day of payment had become certain. The statute can only apply to a case where money is to be paid upon a day certain, or on a given event; whilst here the interest was payable by instalments, before the principal sum could be demanded; and it is quite clear, that, if the plaintiffs had brought an action for non-payment of the first instalment, they must have assigned breaches acccording to the statute, particularly as the times and mode of payment of the instalments were subject to the provisoes and conditions contained in the indenture of assignment, to which the condition of the bond expressly referred. In *Cardoso* v. *Hardy*, the bond was conditioned for payment of a certain sum on a given day, or within one month after the decease of the testator, whichever should first happen. Here, as the interest was payable half-yearly, by instalments, the case falls within the principle of *Willoughby* v. *Swinton* (*a*), with the exception that there all the instalments were not due at the time the bond was put in suit. In *Hurst* v. *Jennings*, the bond upon the face of it appeared to be conditioned for the payment of a sum certain; but, as an indenture of the same date declared the purposes for which the bond was executed, it was held that it was a bond substantially conditioned for the performance of an agreement within the statute, and that the obligee ought to have assigned breaches accordingly. In *Welch* v. *Ireland* (*b*), where a bond was conditioned to perform an award, it was held to be imperative on the plaintiff to assign a breach, and that he could not have judgment for the penalty, and take out execution for the single sum awarded, although the measure of damages had been ascertained by the arbitrator, and expressed on the face of his award. And here, as the plaintiffs have declined to set out the provisoes in the indenture on the face of the record, they

(*a*) 6 East, 550. (*b*) 6 East, 613.

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cannot be entitled to judgment for the penalty of the bond, as the condition referred to the indenture by which the mode of payment of the principal and instalments was fixed and pointed out.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—The question in this case arising upon the record is, whether it was necessary to assign breaches of the condition of the bond stated in the pleadings, under the statute 8 & 9 Will. 3, c. 11, s. 8, and to assess the damages on those breaches. By that statute it is provided, that, in all actions in any Court of record upon any bond, or on any penal sum for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess, not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches as the plaintiff shall upon the trial of the issues prove to have been broken; and the like judgment shall be entered on such verdict as heretofore has been usually done. It then proceeds, after providing for cases of judgment on demurrer, or by confession, or nil dicit, to enact, that, in case the defendant, after such judgment, and before execution, shall pay into Court, to the use of the plaintiff, the damages assessed, and costs, a stay of execution shall be entered on the record; or if, by reason of an execution, the plaintiff be fully paid all the damages and costs, and the charges of the execution, the defendant's body, lands, and goods shall be thereupon discharged from the execution, but the judgment shall notwithstanding remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach of covenant. Now, in this case, it is contended—first, that this bond appears on the record to be for the performance of certain provisoes, conditions,

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stipulations, and agreements contained in a certain indenture of assignment bearing even date with the bond; and that, consequently, it is within the words of the statute. But we think the statute does not apply to this case. The bond, it is true, is for the payment of a sum of money on a day certain, with interest in the mean time: and the liability to pay those sums of money depends on the performance or non-performance of certain provisoes, conditions, stipulations, and agreements contained in another indenture. But the defendant has upon the record averred in his plea payment according to those provisoes, conditions, stipulations, and agreements; which averment is expressly denied by the replication: and the result of the verdict on this issue is, not that unliquidated damages in respect of the breach of those provisoes are due, but that the defendant is liable to pay the specific sum of money for the securing of which the bond was given. This seems to bring the case exactly within that of *Darbishire* v. *Butler* (*a*). There, the plea, after craving oyer of a bond, and after reciting a mortgage deed, shewed the condition to be for payment of a sum certain, according to the tenor of the proviso or condition contained in the indenture, and the defendant pleaded that he paid the money according to the tenor and effect of the condition, which the plaintiff denied by his replication. The Court there held that the plaintiff, in his replication, had denied the whole substance of the defendant's plea, and that there was no occasion for specially assigning a breach, as issue had been properly taken on the precise averment of payment in the plea. And the case of *Hurst* v. *Jennings*, cited in the argument, is plainly distinguishable, on this ground, that there the condition of the bond shewed, by reference to the indenture therein mentioned, that it was not for the payment of a sum certain, but for the performance of an agreement, the breach of

(*a*) 5 J. B. Moore, 198.

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which rendered the party liable to damages only. This brings the case, therefore, to the principal point, which is, whether a bond for the payment of a sum certain on a given day, and of interest in the mean time on specified days anterior to the day fixed for payment of the principal, be a bond within the statute. It is undoubtedly established that an annuity-bond and a bond for money payable by instalments are within the statute; the former having been so held in *Collins* v. *Collins* (*a*), and the latter in *Willoughby* v. *Swinton* (*b*). But both these cases depend, as was observed by Lord Tenterden, in *Murray* v. *The Earl of Stair* (*c*), on the provision in the statute of William, that the judgment should stand as a security for the future payments of the annuity, and the further instalments which might become due. But here, at the time this bond is put in suit, both interest and principal are due, and there is no necessity, that, after execution is once taken out for that amount, the judgment should remain as a security for any purpose whatever. Those cases are therefore materially distinguishable from the present, which appears to fall within the reason, and almost within the letter of *Cardoxo* v. *Hardy* (*d*). The great object of the statute was, to take away the necessity of applying for relief to a Court of equity; and, on this principle, replevin-bonds are held not to be within the act, because the Court can there relieve the defendant without his being compelled to file a bill in equity; and, on the same ground, money bonds are not within it, against the penalty of which the Courts give relief by the statute 4 Anne, c. 16, s. 13, which empowers the Court, pending an action on a money bond, if the defendant shall bring into Court the principal and interest due on such bond, and all costs incurred, to discharge him from such bond altogether. Here, both principal and in-

(*a*) 2 Burr. 820.
(*b*) 6 East, 551.
(*c*) 2 Barn. & Cress. 82.
(*d*) 2 J. B. Moore, 220.

terest are due, and the Court may therefore stay the proceedings, and relieve the defendant. And, if that be so, it will follow, that, according to the principles governing cases of replevin and bail-bonds (*a*), this bond would not be within the statute of William. The only question, indeed, is, whether this be a bond for the payment of a less sum than the penalty, on a day and place certain. And, as it appears, that, under the circumstances which have occurred, and after the period for payment of the principal has once elapsed, the whole amount which can ever become due under the bond becomes an ascertained sum, being the aggregate of both principal and interest, we think this has become a bond for the payment of a sum certain, on the same principles as a post obit bond becomes, after the event has happened, a bond payable on a day certain, and so falls within the statute of Anne: and, if so, then, according to the doctrine laid down by Mr. Justice Holroyd, in *Murray* v. *The Earl of Stair*, the case is clearly not within the statute of William. The cases of *Vansandau* v. —— (*b*) and *Tighe* v. *Crafter* (*c*) are distinguishable in this respect, that there the principal not being due, they fell within the provision of the statute of William as to the judgment standing as a security for the future. Here, after the period for the payment of the principal had once elapsed, nothing but calculation was necessary in order to ascertain the precise sum due on the face of the bond.

Upon the whole, therefore, we are of opinion, that, under the circumstances stated on the record, this bond does not fall within the statute of William; and that no assignment of breaches was necessary; and consequently that the judgment for the plaintiff must stand.

Rule discharged.

(*a*) *Middleton* v. *Bryan*, 3 Man. & Selw. 155; *Moody* v. *Pheasant*, 2 Bos. & Pul. 446.

(*b*) 1 Barn. & Ald. 214.

(*c*) 2 Taunt. 387.

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Wednesday June 12th.

WILLIAMS *v.* HOLLAND.

Where an injury is occasioned by the carelessness and negligence of the defendant, an action on the case is maintainable, although the injury is the result of the *immediate* act of the defendant; provided it be not a *wilful* act.

Where, therefore, the plaintiff declared that the defendant carelessly, unskilfully, and improperly drove his gig against the plaintiff's cart and damaged it: —*Held*, that such carelessness and negligence were strictly and properly the subject of an action on the case, although the act complained of was the immediate act of the defendant.

THIS was an action on the case brought by the plaintiff to recover damages from the defendant for an injury done to a cart of the plaintiff, and to the plaintiff's children, in consequence of the alleged negligence of the defendant.

The declaration stated that the plaintiff, on &c., at &c., was lawfully possessed of a certain cart, and of a certain horse drawing the same, in which said cart certain persons, to wit, John Williams, being the son and servant, and Mary Ann Williams, being the infant daughter of the plaintiff, were then riding in and along a certain public and common highway; and the defendant was then and there possessed of a certain gig, and of a certain other horse drawing the same, which said gig and horse were then and there under the care, government, and direction of the defendant, in and along the said highway, to wit, at &c.; nevertheless, the defendant so *carelessly, unskilfully, and improperly* drove, governed, and directed his said gig and horse, that, by and through the *carelessness, negligence*, unskilfulness, and improper conduct of the defendant, the said gig and horse of the defendant then and there ran and struck with great violence upon and against the cart and horse of the plaintiff, and thereby then and there crushed, broke to pieces, and damaged the same; and the said cart of the plaintiff thereby then and there became and was rendered of little or no value to the plaintiff; and thereby the said John Williams and Mary Ann Williams were then and there cast and thrown with great force and violence from and out of the said cart to and upon the ground there; and, by means of the several premises aforesaid, the plaintiff was deprived of the service of his son, and put to great expense for surgical attendance, medicines, &c. The defendant pleaded the general issue of not guilty.

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The cause was tried before Mr. Justice Bosanquet, at the Sittings in London in the last Easter Term. The facts proved were as follow:—The defendant was driving his gig at a furious rate on a road about twenty-four feet in width, and, being unable to manage and properly guide the horse, in consequence, as it was contended by him, of the horse having run away with him, his gig came in contact with the plaintiff's cart, which was drawn up close to the foot path, and in which the plaintiff's children were sitting. The cart was broken to pieces, and the children thrown out and considerably injured.

On the part of the defendant, it was submitted that the action was misconceived, and ought to have been trespass and not case, as the injury complained of resulted from the immediate act of the defendant, he being proved to have been furiously driving his gig at the time of the accident.

The learned Judge left it to the jury to say whether the injury resulted from unavoidable accident, or from the negligence and carelessness of the defendant. The jury found that the defendant was driving at an improper rate, and returned a verdict for the plaintiff—damages 12*l.*; leave being reserved to the defendant to move to enter a nonsuit, in the event of the Court thinking the objection to be well founded.

Mr. Serjeant *Bompas*, accordingly, in the course of the term, obtained a rule nisi to set aside the verdict and enter a nonsuit.—Where the injury complained of is *immediate* from an act of force done by the defendant, the remedy is trespass; where the injury is only *consequential* to an act before done by the defendant, then an action on the case lies. In *Leame* v. *Bray* (*a*), it was held, that, where one accidentally drives his carriage

(*a*) 3 East, 593; S. C. 5 Esp. Rep. 18.

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against another, the remedy is trespass, and not case; the injury being immediate from the act done, though the party were no otherwise blameable than by driving on the wrong side of the road on a dark night. In *Day* v. *Edwards* (*a*), it was held that a plaintiff cannot declare against a defendant in case for so furiously driving a cart that by the improper conduct of the defendant it was driven with great force against the plaintiff's carriage, per quod the loss happened; the proper remedy being trespass vi et armis. And in *Covell* v. *Laming* (*b*), it was ruled by Lord Ellenborough that trespass was the proper form of action for running against and damaging the plaintiff's ship, where the defendant was himself at the helm. [Mr. Justice *Park* referred to the cases of *Hall* v. *Pickard* (*c*), *Branscombe* v. *Bridges* (*d*), and *Moreton* v. *Hardern* (*e*).]

Mr. Serjeant *Jones*, on a former day in this term, shewed cause.—The plaintiff has alleged in his declaration that his cart was damaged through the carelessness and negligence of the defendant in driving his gig against it; and it was left to the jury to say whether the alleged injury was attributable to accident or to the negligence and carelessness of the defendant. That was the proper direction, and, as the jury have found that the defendant was in fault, their verdict cannot be impugned; and, under the circumstances, case was the proper form of action. Although there are several conflicting decisions on the point, and it is difficult to maintain all the propositions that have been laid down; yet the result seems to be, that, where the act complained of is immediate and *wilful*, the remedy is by an action of trespass; but

(*a*) 5 Term Rep. 648.
(*b*) 1 Camp. 497.
(*c*) 3 Camp. 187.
(*d*) Stark. N. P. C. 171; S. C. 1 Barn. & Cress. 145; 2 Dow. & Ryl. 256.
(*e*) 6 Dow. & Ryl. 275; S. C. 4 Barn. & Cress. 223.

that, where the act is immediate, and occasioned by carelessness or negligence, the plaintiff has his election to sue in trespass or in case. In Chitty on Pleading (*a*), it is said: "In the case of injuries arising from driving carriages, or navigating ships, if the injury were merely attributable to negligence, the party injured has sometimes an election either to treat the negligence of the defendant as the cause of action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass." That is the true distinction. In *Rogers* v. *Imbleton* (*b*), where the plaintiff declared against the defendant for driving his cart against the plaintiff's horse with *force and violence*, alleging it to have been done through the mere *negligence*, inattention, and want of proper care of the defendant; on demurrer, that the plaintiff ought to have declared in trespass, it was held that the declaration in case was good. In *Huggett* v. *Montgomery* (*c*), it was held that case was the proper remedy against the owner of a vessel for damage done to another by the negligence of the pilot, the owner being on board; and that trespass could not be maintained against the latter. In those cases, that of *Leame* v. *Bray* was adverted to as establishing the criterion that, if the injury be received by force, the remedy is by an action of trespass, and that it is immaterial whether it were wilful or not: yet the authority of that case was doubted by Sir James Mansfield in *Rogers* v. *Imbleton*, as he said, that, upon a proper case, it might be fit that the decision in *Leame* v. *Bray* should be reconsidered. So, in *Huggett* v. *Montgomery*, the Court intimated doubts as to the authority of *Leame* v. *Bray*. Besides, that case merely decided that trespass might be maintained, but not that an action on the case would not equally

(*a*) 2nd edit. Vol. 1. p. 127. (*b*) 2 New Rep. 117.
(*c*) 2 New Rep. 446.

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lie. In *Day* v. *Edwards* (*a*), the distinction was first taken by Lord Kenyon between an injury resulting immediately or consequentially; and *Ogle* v. *Barnes* (*b*) was decided on the ground of negligence on the part of the defendant, in running his vessel against the plaintiff's. Mr. Justice Lawrence there said: "Such an injury may be occasioned either by the wilful act or by the negligence of the defendant—it is a question of evidence—if the former, trespass is the proper action; if the latter, an action on the case. It does not appear upon this record that the defendants *wilfully* did the act." Neither has the plaintiff so declared in this case. In *Moreton* v. *Hardern* (*c*), the plaintiff declared in case against three defendants, proprietors of a stage-coach, and alleged that they so *carelessly* managed their coach and horses, that the coach ran against the plaintiff and broke his leg; and it appeared in evidence that one of the proprietors was driving at the time, and the accident happened through his *negligent* driving; it was held that the plaintiff might maintain case against all the proprietors, although, perhaps, he might have been entitled to bring trespass against the one who drove the coach; and Mr. Justice Holroyd said: "In cases where there is no ground of action except the trespass, perhaps case will not lie; but, where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case; as in *Pitts* v. *Gaince* (*d*). In trover, the conversion may be the actual taking of the goods, yet there the trespass may be waived:" and Mr. Justice Littledale said: "I think that an action on the case was maintainable against the defendants. The jury found the injury to have been occasioned by the negligent driving of one of the proprietors. The declaration alleged the injury to have been occa-

(*a*) 5 Term Rep. 648.
(*b*) 8 Term Rep. 188.
(*c*) 4 Barn. & Cress. 223.
(*d*) 1 Salk. 10.

sioned by negligence, as in *Ogle* v. *Barnes*. Here, the cause of the injury is expressly stated to have been negligence." So here, and in other cases, that which is an aggravation of the trespass may be the subject of an action on the case. That is precisely this case, and there is no pretence for saying that the defendant intended to do a *wilful* injury to the plaintiff; and, whether he were driving too fast or not, the accident is attributable to his negligence or want of skill, which is the alleged cause of action, and which is supported by the finding of the jury. The action, therefore, is properly framed in case, although, perhaps, *trespass* might have been maintainable.

Mr. Serjeant *Bompas*, in support of his rule.—The great and leading distinction in cases of this nature, is between acts of misfeasance and of nonfeasance by the defendant; and, when the act complained of is *immediate*, the plaintiff's remedy is by an action of trespass, whether the act be attributable to wilfulness or negligence. The question then is, whether in this case the plaintiff had his election to waive the trespass for the immediate injury done to his cart by the defendant's driving his gig against it, and to sue in case. The cases of *Weaver* v. *Ward* (*a*) and *Underwood* v. *Hewson* (*b*) shew that trespass is maintainable for an *immediate* injury, although it were not *wilful*, as in accidentally discharging a gun. In *Haward* v. *Bankes* (*c*), the Court said: the plaintiff describes in his declaration a fact which, as it comes out at the trial, may or may not be a proper strict trespass; it might be proved to be either trespass or case according to the evidence. If it had been proved to have been trespass vi et armis, the plaintiff must have been nonsuited. In *Reynolds* v.

(*a*) Hobart, 134. (*b*) 1 Str. 596.

(*c*) 2 Burr. 1114.

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Clarke (*a*), the distinction is taken, that, for an act immediately injurious, trespass is the proper remedy, but that case lies for an injury which is merely consequential. In *Scott* v. *Shepherd*, Mr. Justice Blackstone said (*b*) he took the settled distinction to be, that, where the injury is *immediate*, an action of trespass would lie; where it is only *consequential*, it must be an action on the case—the lawfulness or unlawfulness of the original act is not the criterion: and Mr. Justice Gould said: "Wherever a man does an unlawful act he is answerable for all the consequences; and trespass will lie against him if the consequence be in nature of trespass." In *Reynolds* v. *Clarke*, as reported in Strange, Lord Chief Justice Raymond said (*c*): "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion; if the act in the first instance be unlawful, trespass will lie; but, if the act is prima facie lawful, and the prejudice to another is not immediate, but consequential, it must be an action upon the case; and this is the distinction." In *Day* v. *Edwards*, Lord Kenyon said (*d*): "If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy." There, the plaintiff declared in case, but, as he complained of the immediate act of the defendant's driving with force against his carriage, the Court held that the action was misconceived, and that he should have brought trespass. *Rogers* v. *Imbleton* came before the Court on demurrer, and was not argued, as the demurrer was withdrawn by consent; and *Huggett* v. *Montgomery* was decided on the ground that the owner of the ship was not liable for an act of negligence on the part of the pilot, under whose direction the vessel was at the time. In *Ogle* v. *Barnes*, Lord Kenyon

(*a*) 2 Lord Raym. 1399.
(*b*) 2 Sir W. Blac. 894.
(*c*) 1 Str. 635.
(*d*) 5 Term Rep. 649.

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said (*a*): "It is clear that the mind need not concur in the act that occasions an injury to another; if the act occasion an immediate injury to another; trespass is the proper remedy." In *Leame* v. *Bray* (which is the leading case on this subject), Lord Ellenborough said (*b*): "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff is injured by it, it is the subject of an action of trespass vi et armis, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." That is the true criterion: and here there can be no doubt but that the plaintiff received an injury from an immediate act of force by the defendant driving against his cart. In *Covell* v. *Laming*, Lord Ellenborough said (*c*): "If in the dark I ignorantly ride against another man on horseback, this is undoubtedly trespass, although I was not aware of his presence till we came into contact;" and in *Lotan* v. *Cross*, his lordship said (*d*): The injury to the plaintiff being immediate from the act done by the defendant, it was settled in *Leame* v. *Bray* that trespass is the proper remedy, and that the defendant's intentions were immaterial:" and the Court refused to grant a new trial, on the objection that the action, which was for running against the plaintiff's chaise, should have been case and not trespass. In *Hall* v. *Pickard* (*e*), the plaintiff was not in possession of the horses, as he had let them to hire for a certain term, which had not expired when the accident happened. In *Savignac* v. *Roome*, Lord Kenyon said (*f*): "It is of importance that the boundaries between the different actions should be preserved, and particularly in cases of this kind; for, if in an action of trespass, the plaintiff recover less than forty shillings, he is entitled to no more costs than damages; whereas a verdict with nominal damages only in an action

(*a*) 8 Term Rep. 190.
(*b*) 3 East, 599.
(*c*) 1 Camp. 498.
(*d*) 2 Camp. 465.
(*e*) 3 Camp. 188.
(*f*) 6 Term Rep. 129.

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on the case carries all the costs." In *Turner* v. *Hawkins*, Lord Chief Justice Eyre said(*a*): "Undoubtedly, we ought to endeavour to preserve the distinction of actions; and therefore if it appear upon the pleadings that actions of a different nature have been mixed, that is a sufficent ground for arresting the judgment." There, however, the cause of action was nonfeasance, which was strictly the subject of an action on the case. In *Branscombe* v. *Bridges*, in an action on the case for distraining goods after a tender of the rent due, on its being objected that the plaintiff should have declared in trespass, Lord Chief Justice Abbott thought the plaintiff could not recover, although it was contended that he might waive the trespass, and proceed for the consequential damage. In *Lloyd* v. *Needham*, Mr. Baron Graham differed from the rest of the Court, and observed(*b*): "It is said the trespass may be waived; but, if you waive the trespass in such cases, it is my opinion you waive every thing which entitles you to seek redress in a Court of law, and there is no longer any foundation for your action. The defendant (as in this case) had given the impetus and momentum to the horse and carriage, which was the immediate cause of a direct injury." *Moreton* v. *Hardern* is distinguishable, as there two of the proprietors were absent, and therefore they could not be liable in trespass for the act of their co-proprietor. The result of all the authorities is, that, where there is evidence that the injury is attributable to, or arises from the immediate act of the party causing it, an action on the case cannot be maintained; but the remedy of the injured party is by an action of trespass, whether the act complained of be wilful or the result of negligence.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judg-

(*a*) 1 Bos. & Pul. 476. (*b*) 11 Price, 6.

ment of the Court:—This was an action on the case, in which the declaration states that the plaintiff was possessed of a cart, and of a horse drawing the same, in which cart were the plaintiff's son and daughter; and that the defendant was possessed of a gig and horse drawing the same, "which gig and horse were then under the care, &c., of the defendant, who was driving the same in and along the highway:" nevertheless, the defendant "so carelessly, unskilfully, and improperly drove, &c., his said gig and horse," that, through the carelessness of the defendant, the said gig and horse of the defendant ran and struck with great violence upon and against the horse and cart of the plaintiff, and thereby broke to pieces the same, and the son and daughter of the plaintiff were greatly hurt, &c. The defendant pleaded the general issue; and, on the trial the question left to the jury was, whether the injury was occasioned by the negligence and carelessness of the defendant; which question the jury found in the affirmative, and gave their verdict for the plaintiff, with 12*l.* damages. After the trial, the present rule was obtained for setting aside the verdict and entering a nonsuit, under leave given for that purpose, upon the ground that, the injury having been occasioned by the immediate act of the defendant himself, the action ought to have been trespass, and that case was not maintainable; and, amongst other cases cited by the defendant's counsel in support of this objection, that of *Leame* v. *Bray* was principally relied upon as an authority in point. The declaration in this case states the ground of action to be an injury occasioned by the *carelessness* and *negligence* of the defendant in driving his own gig; and that such carelessness and negligence is strictly and properly in itself the subject of an action on the case, would appear, if any authority were wanting, from Comyns's Digest (*a*); and the jury have found, in the very terms of

(*a*) Tit. "Action upon the Case for Negligence."

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the declaration, that the injury was so occasioned. Under such a form of action, therefore, and with such a finding by the jury, the present objection ought not to prevail, unless some positive and inflexible rule of law, or some authority too strong to be overcome, is brought forward in its support. If such are to be found, they must undoubtedly be adhered to; for, settled forms of action adapted to different grievances, contribute much to the certain administration of justice. But, upon examining the cases cited in argument, both in support of and in answer to the objection, we cannot find one in which it is distinctly held that the present form of action is *not* maintainable, under the circumstances of this case. For, as to *Leame* v. *Bray*, on which the principal reliance is placed by the defendant, in which the form of action was trespass, and the circumstances were very nearly the same as those in the case now under consideration, the only rule established is, that an action of trespass *might* be maintained, not that an action on the case could not. The case of *Savignac* v. *Roome*, in which the Court held that case would not lie where the defendant's servant *wilfully* drove against the plaintiff's carriage, was founded on the principle that *no action* would lie against the master for the wilful act of his servant; and in that of *Day* v. *Edwards*, in which it was ruled that trespass was the proper remedy, and not case, it should be observed that the question arose upon a special demurrer to the declaration, and that the declaration stated that the defendant "so *furiously*, negligently, and improperly drove his cart and horse, that, through the *furious*, negligent, and improper conduct of the defendant, the cart and horse were driven and struck with great force and violence upon and against the carriage of the plaintiff." The question, therefore, arising upon a special demurrer, where the Court could look to nothing but the legal construction of the declaration, is very differently circumstanced from this, where the jury have found that *negligence* was the ground of the injury. On the other

hand, the cases of *Rogers* v. *Imbleton*, and *Ogle* v. *Barnes* and others, are simply in favour of the proposition that the present form of action is, under the circumstances, maintainable. We hold it, however, to be unnecessary to examine very minutely the grounds of the various decisions; for, the late case of *Moreton* v. *Hardern* appears to us to go the full length of deciding, that, where the injury is occasioned by the carelessness and negligence of the defendant, although it be occasioned by his *immediate* act, the plaintiff may, if he thinks proper, make the negligence of the defendant the ground of his action, and declare in case. It has been urged, indeed, in answer to that case, that it was decided on the ground that the action was brought against one of the proprietors who was driving, and against his co-proprietors, who were absent, but whose servant was on the box at the time; and that, as trespass would not have been maintainable against the co-proprietors who were absent, so case was held maintainable, in order that all the proprietors might be included. But it is manifest that the Court did not rest their opinion upon so narrow a ground; nor, indeed, would it have been a solid foundation for the judgment, that the master who was present should be made liable to a different form of action than he otherwise would have been, if the servant of the other proprietors had not been there. We think the case last above referred to has laid down a plain and intelligible rule, that, where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is *immediate*, so long as it is not a *wilful* act; and, upon the authority of that case, we think the present form of action maintainable to recover damages for the injury.

Rule discharged.

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It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of Court, it is sufficient, although the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for *signing* as well as for *sealing* such writ.

A RULE was obtained by Mr. Serjeant *Jones* on a former day in this term, calling upon the plaintiff to shew cause why the service of the copy of the writ of summons upon the defendant in this cause should not be set aside, on on the ground that the name of the filacer who ought to have signed the writ of summons did not appear at the foot, nor was indorsed on the back of the copy so served. The learned Serjeant submitted, that, although in *Frost* v. *Eyles* (*a*) it was held that it was not necessary to add the name of the filacer to a writ of common capias in this Court; yet that the writ of summons for compelling the defendant to appear in the first instance was now substituted by the uniformity of process act, 2 Will. 4, c. 39, s. 1; and in this Court writs are signed by the filacer of the county into which they are issued. And now, by a general rule of all the Courts (*b*), a fee of two shillings and sixpence is allowed to be taken for signing all writs for compelling an appearance, whether of summons, distringas, capias, or detainer, and whether the same shall be the first writ, or an alias or pluries writ; and whether the same shall issue into the same county as the preceding writ, or into a different county; and a fee of seven pence is also allowed for sealing the same.

[The Court, on granting the rule, said, they wished to look at the original writ of summons.]

Mr. Serjeant *Bompas* now shewed cause.—He produced an affidavit of the clerk of the plaintiff's attorney, who stated that he had lost the original writ, but that it had been duly stamped by the filacer, and afterwards sealed; and that the præcipe for the writ had been delivered to the

(*a*) 1 Hen. Bl. 120.

(*b*) Mich. 3 Will. 4, Reg. 2; 2 Moore & Scott, 329; 9 Bing. 443.

officer when the writ of summons was applied for. The learned Serjeant submitted, that, as in *Frost* v. *Eyles* it was held to be unnecessary to add the name of the filacer to a writ of capias, he was not required to put his name at the foot of the writ of summons, although he might be entitled to a fee for signing such writ. The statute, 2 Will. 4, c. 39, merely requires the writ of summons to be issued by the officer of the Court by whom process serviceable in the county therein mentioned had been heretofore issued; but it does not follow that the officer who issues the writ is to sign his name to it. The teste is equivalent to a signature, and the impressing it with the mark or stamp of the Court is all that can be required, either by the statute or the rule of Michaelmas, 3 Will. 4: the seal authenticates the issuing of the writ, and the filacer is the proper officer to mark or impress the stamp upon it.

Mr. Serjeant *Jones*, in support of his rule.—It does not appear that the copy of the writ of summons served on the defendant is a true copy of the original process or writ of summons, which the Court required to be produced; and, although it is sworn to have been lost, yet the affidavit is wholly silent as to its contents; and the Court will presume that it was *signed* as well as *sealed*, according to the terms of the late rule, as two distinct fees were payable, viz. two and sixpence for signing, and seven pence for sealing. In this Court, there are different filacers for different counties, and, by the uniformity of process act, 2 Will. 4, c. 39, s. 1, the writ of summons is to be issued by the officer of the Court by whom serviceable process *in the county* therein mentioned has been heretofore issued; and the writ of summons and the copy must not only contain the place and county of the defendant's residence, but must be issued by the proper filacer of the county where the writ is to be

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served. The mere stamping or sealing the writ does not shew who the filacer was that issued it, and the stamp is not equivalent to a signature. Besides, the defendant or party served should have sufficient evidence on the face of the copy of the writ to enable him to ascertain the name of the filacer or officer by whom it was issued, and that he had jurisdiction to sue it out: but here it does not appear by the copy served on the defendant, that the writ of summons was issued by the proper filacer. The mere impression of the stamp of the Court gives no such information, as the same stamp is used by all the filacers indiscriminately; and the statute requires the writ to be issued by the proper filacer *of the county* where the defendant resides, and that officer is now entitled to a distinct fee for *signing* the writ.

Lord Chief Justice TINDAL.—The application by the defendant to set aside the service of the copy of the writ of summons with which he was duly served, is extremi et strictissimi juris, and we are not to assume that the filacer did not sign his name to the original writ, which is sworn to have been lost; but, whether it were lost accidentally, or by what other means, does not appear. The question then is, whether it is absolutely necessary that the filacer for the county in which the writ of summons is to be served, should sign his name at the foot of the writ. Before the passing of the late act for the uniformity of process in the several Courts of law, it appears that it was not necessary, nor does it seem to me to be so now; for, although different filacers are appointed for different counties, yet, in point of law, as far as the issuing of writs is concerned, one may perform the office of all: and the officer has stated to us, that, where several defendants residing in different counties are joined in one writ, the filacer does not sign his name, as it might be

productive of great inconvenience, and tend to mislead the parties served. The signing of the name may be considered as the private mark or memorandum of the filacer. That part of the statute 2 Will. 4, c. 39, s. 1, which enacts that the writ of summons therein mentioned shall be issued by the officer of the Courts by whom process serviceable in the county therein mentioned, had been theretofore issued, is about to be repealed. The argument for the defendant has principally turned on the terms of the late rule of Court (*a*), by which fees are allowed to be taken for *signing* all writs for compelling an appearance, as well as for *sealing* them. But it does not therefore follow that the filacer must sign his name to all writs of summons; for, as I have before observed, it would be productive of great inconvenience and additional expense where several defendants are included in one writ, and residing in different counties, as, in such a case, several writs of summons must be sued out against each of them. The case of *Frost* v. *Eyles* is an authority to shew, that, before the late statute, if a capias had been regularly issued, and gone through the filacer's office, it was not necessary for him to put his name to it. His doing so is a mere matter of convenience to himself; for, when a writ has been duly issued, the name of the filacer issuing it might be easily ascertained by inquiry at the office. Here, the copy of the writ served on the defendant appears to be marked or stamped thus—"C. B. Filacer's office"—which is sufficient to indicate that it passed regularly through that office; besides which, it appears to have been sealed by the sealer of the writs. As, therefore, the filacer was not, before the passing of the late act, required to sign his name, I do not see why it is now necessary for him to do so, provided the writ be duly *stamped* and *sealed*.

(*a*) Mich. 3 Will. 4, Reg. 2.

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Mr. Justice PARK concurred.

Mr. Justice GASELEE.—The only difficulty I felt was as to the terms of the late rule, which authorizes two fees to be taken, the one for the *signing*, and the other for *sealing* the writ of summons; but, as the statute 2 Will. 4, c. 39, requires the place and county of the residence of the defendant or party served to be mentioned in the body of the writ, it points out in terms who the filacer is by whom the writ was issued.

Mr. Justice BOSANQUET.—I am of the same opinion; and, as it appears that it was not necessary for the filacer to sign his name to a capias before the passing of the late act, I do not think that that statute requires him to do so, in the case of a writ of summons: and here no doubt fees were taken for stamping as well as for sealing the original writ. This rule, therefore, must be discharged.

Rule discharged, with costs.

Wednesday, June 12th.

The sheriff having returned a rescue of a party arrested from his bailiff, instead of himself, the Court notwithstanding granted a rule absolute in the first instance for an attachment against the rescuers.

GOBBEY *v.* DEWES.

MR. Serjeant *Wilde* applied for an attachment against several persons whom he named, for having rescued the defendant from the custody of the sheriff of Middlesex. The sheriff, in his return to the writ under which the defendant was arrested, stated, that, by virtue of the writ to him directed, he made his warrant in writing under his seal, to his bailiff, to take and arrest the defendant; by virtue of which warrant the bailiff took and arrestedthe defendant at a certain hotel in King Street, St. James's, and safely kept and detained him in his custody,

until A. B., and certain waiters, and other persons at the hotel, and then unknown to the bailiff, assaulted and ill-treated him, and rescued the defendant out of his custody, whothereupon escaped; and that he had not since been able to find or re-take him. The learned Serjeant submitted, that, although in *Woodgate* v. *Knatchbull*(*a*), Mr. Justice Buller said that it had been held that a return made by a sheriff that the person arrested was rescued out of the custody of the bailiff, was bad, as the return should be that the person was rescued out of *his* custody; for that the sheriff is the only officer known to the Court; and that he may employ whom he pleases; but he is answerable civiliter for the acts of all those employed by him. And in *The King* v. *The Sheriff of Middlesex*(*b*), the return made by the sheriff, stating that he arrested and detained the defendant until he rescued himself out of custody, was held sufficient, without naming the rescuers. The return made by the sheriff is not traversable. Although in Comyns's Digest(*c*) it is said: "A rescous from the bailiff is a rescous from the sheriff and ought to be returned as such (*d*);" yet it is also said (*e*): "It is sufficient to say that he was rescued out of the custody of a bailiff virtute warranti sibi facti, for this is out of the custody of the sheriff" (*f*). And here the form of the return is conformable to the precedent in the Appendix to the ninth edition of Tidd's Practice (*g*).

The COURT held the return to be sufficient.

Rule absolute for the attachment in the first instance.

(*a*) 2 Term Rep. 148.
(*b*) 1 Barn. & Ald. 190.
(*c*) Tit. "Rescous," (D. 4).
(*d*) 2 Rolle, 436, l. 50; Dy. 241, n.
(*e*) Tit. "Rescous," (D. 5).
(*f*) 2 Sir W. Jones, 197; Salk. 586; 2 Lev. 28.
(*g*) Appendix, 109; and see Tidd's Practice, Vol. 1, p. 308.

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MANSER *v.* PIERCY.

A person who has lain in prison twelve months under an execution sued out on a judgment for a less sum than 20*l.* is entitled to his discharge under the statute 48 Geo. 3, c. 123, although he had sufficient property at the time of the application to satisfy the judgment, and although several other detainers were lodged against him by other creditors.

A RULE was obtained by Mr. Serjeant *Stephen*, on a former day in this term, calling on the plaintiff to shew cause why the defendant should not be discharged under the statute 48 Geo. 3, c. 123, s. 1, on affidavits which stated that he was charged in execution at the suit of the plaintiff, on a judgment obtained by him against the defendant for a less sum than 20*l.*, and that the defendant had lain in prison more than twelve months under and by virtue of such judgment.

Mr. Serjeant *Bompas* now shewed cause, on affidavits which stated that the defendant was now fully competent to pay the debt due to the plaintiff, as property had lately been devised to him by a relation, amounting in value to 300*l.* per annum; and that the Court of King's Bench had refused an application for his discharge a few days since. It was also sworn that several other detainers were lodged against the defendant.—The learned Serjeant submitted that this case did not fall within the language or meaning of the statute, which only contemplated a detention of the debtor in prison by virtue of an execution obtained upon a judgment at the suit of a particular creditor, and not for other debts due to third persons, as to which the defendant clearly could not be entitled to his discharge under this summary application, as the words of the act are, that all persons in execution upon any judgment for any debt or damages not exceeding the sum of 20*l.*, and who shall have lain in prison thereupon for twelve months previous to the application, shall be entitled to their discharge.

PER CURIAM.—The statute, being remedial, and passed for the relief of persons imprisoned for small debts,

must receive a liberal construction. The words of the act are imperative, namely, that persons falling within its provisions shall and may, upon application to the satisfaction of the Court, be forthwith discharged out of custody as to such execution. Although the latter words apply only to the execution on the judgment obtained by the plaintiff against the defendant, yet he is entitled to his discharge quoad this debt, although he may be liable to other creditors on several detainers against him; and it must be remembered that the property he has acquired since his imprisonment is still liable for the payment of the debts previously incurred.

Rule absolute.

Regulae Generales.

Time for declaring against a defendant in custody under a writ of capias or detainer.

IT IS DECLARED AND ORDERED, that, in all cases in which a defendant shall have been or shall be detained in prison on any writ of capias or detainer under the statute 2 Will. 4, c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the statute 2 Will. 4, c. 39, Schedule, No. 2; unless further time to declare

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shall have been given to such plaintiff by rule of Court or order of a Judge.

Tenterden.	J. Littledale.	J. B. Bosanquet.
N. C. Tindal.	S. Gaselee.	W. E. Taunton.
Lyndhurst.	J. Vaughan.	E. H. Alderson.
J. Bayley.	J. Parke.	J. Patteson.
J. A. Park.	W. Bolland.	J. Gurney.

Time and manner of pleading by prisoners.

It is ordered, that, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

(Signed by all the Judges.)

Time for rendering principal, where the bail are sued upon their recognizance.

It is ordered, that, from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only.

(Signed by all the Judges.)

The Judges who sat in Banc during this term were—The Lord Chief justice, Mr. Justice Park, Mr. Justice Gaselee, and Mr. Justice Bosanquet.

END OF TRINITY TERM.

In the Exchequer Chamber.

TRINITY TERM, 3 WILL. IV.

WOLVERIDGE *v.* STEWARD.

[In error.]

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THIS was an action of covenant by an assignor (a lessee) against his immediate assignee, for non-performance of the covenants in the original lease, on the part of the lessee and his assigns to be performed, and which it was contended on the part of the plaintiff that the defendant, according to the legal effect of the assignment from the plaintiff to him, covenanted to perform. The assignment was *by indenture, executed by both parties*, and was made subject to the payment of rent and performance of the covenants and agreements reserved and contained in the original lease. The defendant below took possession and occupied the premises under this assignment, and, before the expiration of the term, assigned to a third person. After the assignment by the defendant below, the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear. The cause came on before the Court of Common Pleas on demurrer to one of the defendant's pleas—see the pleadings ante, Vol. 2, p. 75. That Court, after argument, held that covenant was maintainable by the plaintiff below (the lessee) against the defendant below (his assignee), in respect of breaches

A, by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained in the original lease." B. entered under this assignment, and afterwards assigned over to a third person: —*Held*, that B. was not liable in covenant to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee—the words "subject to the payment of the rent, &c." being words of qualification, and not of contract.

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committed by the sub-assignee, notwithstanding the defendant below had parted with his interest in the premises.

The record was moved by writ of error to this Court. The errors assigned were (besides the common errors), that the declaration and the matters therein contained were not sufficient in law for maintaining the action; and that, by the record, it appeared that the defendant below was liable to the plaintiff below upon a covenant implied in law from the language of the second mentioned indenture.

Mr. *C. R. Turner*, for the plaintiff in error.—The plaintiff in error cannot be liable to this action, unless, in the assignment from the defendant in error to him, there is an express covenant on the part of the plaintiff in error to pay the rent and perform the covenants contained in the original indenture during the whole of the unexpired term, or to indemnify the defendant in error against such covenants; for, otherwise, the liability of the plaintiff in error as assignee ceased when he parted with his interest in the premises by assignment to a third person—*Taylor* v. *Shum* (*a*), *Pitcher* v. *Stovey* (*b*), *Valliant* v. *Dodemede* (*c*), *Odell* v. *Wake* (*d*). The assignment in this case contains no such express covenant: but it is said that the words "subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease," create such a covenant. Those words, however, amount at most only to an implied covenant. It is also material to observe the particular part of the instrument in which they are found, viz, the habendum, the office of which is, "to limit the estate, so that the general implication of the estate which will pass by construction

(*a*) 1 Bos. & Pull. 21.
(*b*) 4 Mod. 71.
(*c*) 2 Atk. 546.
(*d*) 3 Camp. 394.

of law by the premises, is always controlled and qualified by the habendum (*a*)." That such is the proper office of the habendum also appears in Coke Littleton (*b*), where it is laid down, that, "if in the premises lands be letten, or a rent granted, the general intendment is that an estate for life passeth; but, if the habendum limit the same for years or at will, the habendum doth qualify the general intendment of the premises: and the reason of this is, for that it is a maxim in law that every man's grant shall be taken by construction of law most forcible against himself." The words in question in this case, therefore, are evidently mere words of qualification and condition. It is true that any words in a deed which shew an agreement to do a thing create a covenant (*c*); but there must be express words of agreement. In Rolle's Abridgment it is said (*d*): "If lessee for years covenant to repair—provided always, *and it is agreed*, that the lessor shall find great timber, &c.—this shall make a covenant on the part of the lessor to find great timber, by the word *agreed*, and shall not be a qualification of the covenant of the lessee. But, if the lessee covenant to repair—provided always that the lessor shall find great timber, without the word *agreed*—this proviso shall not be any covenant on the part of the lessor, but shall only be a qualification of the covenant of the lessee." In *Staines* v. *Morris* (*e*), similar words to those in the assignment sub judice were used, and Lord Eldon appears not to have supposed them to amount to an express covenant. *Burnett* v. *Lynch* (*f*), which probably will be relied on on the part of the defendant in error, is an authority to this extent only, that it is the duty of an

(*a*) Vin. Abr. tit "Grants," (I. a).

(*b*) Co. Litt. 183. a.

(*c*) Com. Dig. tit. "Covenant," (A. 2). Selwyn's Nisi Prius, tit. "Covenant," s. 3.

(*d*) Title "Covenant," (C), pl. 52, 53.

(*e*) 1 Ves. & Bea. 8.

(*f*) 5 Barn. & Cress. 589; S. C. 8 Dow. & Ryl. 368.

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assignee, so long as he remains assignee, to pay the ren and perform the covenants contained in the lease—a duty arising out of the relation between the landlord and tenant. Mr. Justice Bayley there says: "That duty appears to me to be very accurately stated in the declaration, where it is described as commensurate with the time during which the assignee had an interest in the premises."

Mr. Serjeant *Bompas*, for the defendant in error.—The deed in question is an indenture *executed by both parties*, and not a mere deed-poll; consequently, the words are no more the words of the grantor than of the grantee: they are equivalent to the words "yielding and paying," which, in *Newton* v. *Osborn* (*a*), were held to amount to an express covenant. Mr. Justice Blackstone, in his Commentaries, says (*b*): "*Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as, to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which the law presumes that every man undertakes to perform." In the present case, the words "subject to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the lease," amount to an express covenant that the assignee shall hold during the remainder of the term, and be subject to all the covenants contained in the original lease. In *Burnett* v. *Lynch*, the assignment was by deed-poll. Mr. Justice Littledale there says: "The word *assign* in this deed-poll does not import any covenant or contract on the part of the assignee, but it is a mere description of the interest conveyed. It is true that the lessee does not assign the term generally, but that he assigns it subject to the payment of the rent and performance of the covenants. The assign-

(*a*) Styles, 387. (*b*) Vol. 2, p. 443.

ment being by deed-poll, does not, however, contain any contract on the part of the assignee; and, in order to enable the assignor to maintain covenant against the assignee, there must be a contract under seal by the latter." Here, there is such a contract by the assignee. And Mr. Justice Holroyd, in that case, says: "What is the effect of the assignment? The assignee by virtue of it stands in the situation of the lessee, and becomes bound to pay the rent and perform the covenants. By accepting the assignment, he states that he is subject to the rent and the performance of the covenants." In *Chancellor* v. *Poole* (*a*), it was held that the assignee of a term, declared against as such, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. There, the assignment was by deed-poll, and the action was brought by the lessor. Lord Mansfield said the question was whether the plaintiff was a contracting or merely an assenting party in the deed-poll: and he adds—"There is a covenant by the defendant for paying the rent in the deed-poll; but it is with the lessee." And Mr. Justice Ashhurst said—"The plaintiff seems to me to have decided against himself; for, he has stated this as an assignment. If he had meant to avail himself of it as a contract between himself and the defendant, he should have stated it, according to the legal operation, and as a demise from the plaintiff to the defendant." The words of the demise in that case were—"the assignee paying the rent and performing the covenants."

Mr. *Turner* was heard in reply.

Cur. adv. vult.

Lord Chief Justice DENMAN now delivered the judgment of the Court:—This case comes before the Court on

(*a*) 2 Doug. 764.

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a writ of error from the Court of Common Pleas. It is an action of covenant brought by the defendant in error on an indenture of assignment of a term for years. The declaration states the original lease from the lessor to the defendant in error for twenty-one years from March, 1820, containing a covenant to pay rent quarterly; and that, *by indenture executed by the plaintiff and defendant*, the defendant in error assigned to the plaintiff in error, his executors, administrators and assigns, the said indenture of lease, and the demised premises, and all the estate, right, title, and interest, term of years then to come and unexpired, property, claim, and demand of the defendant in error by virtue of the said indenture of lease, &c., therein, to have and to hold the said lease, together with the said premises by the same demised and by the same assignment assigned, to the plaintiff in error, his executors, administrators, and assigns, during all the rest and remainder of the said term of twenty-one years granted by the said indenture of lease then to come and unexpired, *subject nevertheless to the payment of the yearly rent and the performance of the covenants and agreements reserved and contained in the said indenture of lease;* and that the plaintiff in error accepted the said assignment, and entered. The declaration then assigns as a breach the nonpayment of rent due after the assignment, by reason whereof the defendant in error was obliged to pay the amount. The plaintiff in error (the defendant below) pleaded several pleas, on which issue was joined, and found against him; and one plea, viz. that, before the rent became due, he assigned over; to which plea there was a demurrer and joinder, on which judgment was given by the Court of Common Pleas for the defendant in error.

The question in this case is, whether the plaintiff in error is liable to the defendant in error for nonpayment of rent due after he had assigned one; and that depends

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upon the further question, whether the words "subject nevertheless to the payment of the yearly rent, &c.," amount to a covenant to pay the rent during the whole residue of the unexpired term. If they do, the judgment of the Court below ought to be affirmed; if they do not, it ought to be reversed. We are of opinion that they do not.

It is fully established that no precise form of words is necessary to constitute a covenant—"Any words in a deed which *shew an agreement* to do a thing, make a covenant (*a*):" but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification (*b*). Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor, not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable? To determine this we must look at the indenture as stated on the record, and observe in what part the words occur. They come after the habendum, and constitute part of it. Though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself; and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended: this is properly done in the habendum. The office of the habendum is, to limit the certainty of the estate (*c*). "It doth qualify the general intendment of the premises; and the reason of this is, for that it is a maxim of law that every man's grant

(*a*) Com. Dig. "Covenant," (A. 2).

(*b*) Com. Dig. "Covenant," (A. 3.); I Roll. Abr. 518.

(*c*) Co. Litt. 6. a.

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shall be taken by construction of law most forcible against himself (*a*)." As these expressions, therefore, occur in that part of the deed in which they ought to be if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only; and some instances were adduced by the counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification. For example, the assignment of a lease by way of mortgage, and the conveyance of an estate, subject to a mortgage or incumbrance, to a second mortgagee, or to a purchaser, where it is impossible that these words could constitute a covenant by the mortgagee to pay the rent in the one case, or by the second mortgagee or purchaser to pay off the mortgage or incumbrance in the other. It may be said, however, that, in these instances, the context and subject matter of the instrument lead to the inference that no covenant was intended by these words; but that, in the present case, no such inference arises; and that the same words in different instruments may have different meanings. This may be true; but it lies upon the defendant in error to shew affirmatively that the words amount to an agreement with him to pay the rent and perform the covenants; and, is there any thing in this indenture which tends to prove that they were meant to be used in any other sense than that which would naturally be attributed to them in the place in which they occur? On the contrary, if the assignor really intended that the assignee should covenant with him to pay the rent and perform every covenant during the term, and thus become liable, not only for his own defaults, but for those of all subsequent assignees, and the assignee really intended also to bind himself to that extent, is it not to be expected that

(*a*) Co. Litt. 133. a. See also Hale, 171; Com. Dig. "Fait," (E. 9).

they would have expressed themselves in distinct unambiguous language? especially as it is the usual practice in cases of this kind, where such a liability is intended, for the assignee to enter into a bond or an express covenant of indemnity with the assignor against the covenants in the original lease. It is a very just remark made by the counsel for the plaintiff in error, that it is the duty of a party who intends to bind another by a covenant in a former formal instrument, to insert it in that instrument, in distinct and intelligible terms, by which the party to be bound cannot be deceived, and not to call upon the Court to infer such a covenant from words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other.

For these reasons, we think that the proper construction of this indenture is, that these are words of qualification, and not of contract; and, if the question were entirely new, we should adopt that construction. We have, however, the authority of the Court of King's Bench in a case which is not reported, the particulars of which have been furnished to us by my brother James Parke, who was counsel in it—*Mills* v. *Harris*, Michaelmas Term, 1820. It was an action of assumpsit by the assignor against the assignee of a lease, who had accepted but not executed the assignment, for not repaying to the assignor the rent which he had been obliged to pay after the assignee had assigned over. The deed contained similar words to those in this instrument. Lord Tenterden nonsuited the plaintiff on the trial, at the Sittings before Michaelmas Term, 1820. On a motion for a new trial, the Court confirmed his Lordship's decision by refusing a rule, on the ground that these were not words of agreement, but were merely descriptive of the obligations to which the assignee would be liable as between him and the lessor. It remains only to make some observations on the cases relied on by the defendant

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in error. That of *Burnett* v. *Lynch* proceeds upon the ground that, *during the continuance of the interest of the assignee*, there is a duty on his part to pay the rent and to perform the covenants. Mr. Justice Bayley, in giving judgment, states that the duty is commensurate with the time during which the assignee has an interest in the premises. This duty we think would arise from the mere relation between the parties; for, the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound whilst he is assignee to pay the rent and perform the covenants running with the estate; and the surety, after paying the debt or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each; for, the lessee is, in effect, a surety for each of them to the lessor. The case of *Chancellor* v. *Poole* was also mentioned, in which Lord Mansfield said, " that there was a covenant by the defendant for paying the rent in the deed-poll, but it was with *the lessee*." There, however, the words of the instrument were very different; they were these—" the assignee paying the rent and performing the covenants, and indemnifying the lessee against the same;" which last words were incapable of being construed as qualifying the generality of the granting part, and could have no other effect than an agreement on the part of the assignee with the assignor.

For these reasons, we think that the judgment of the Court of Common Pleas ought to be reversed.

Judgment reversed.

In the House of Lords.

TRINITY VACATION, 3 WILL. IV.

1833.

Wednesday, May 28th.

CADELL *v.* PALMER.

A limitation by way of executory devise, not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person whatever, is not void, as too remote, or otherwise: but twenty-one years after the expiration of a life or lives in being, is the limit, and cannot be extended by the number of months equal to the ordinary or longest period of gestation, except in cases where the gestation exists.

MR. HENRY BENGOUGH, by his will, dated the 9th April, 1818, devised all the residue of his real estate unto and to the use of trustees, their heirs and assigns, upon trust (after paying certain annuities) from time to time during the term of twenty-one years, to be computed from the day of his (testator's) decease, to receive the rents, and lay out the same, as often as there should be a surplus amounting to 1,500*l.*, in the purchase of freehold estates of inheritance; and the testator directed that the estates so to be purchased should be conveyed to the use of the trustees upon the trusts thereinafter declared concerning the real estate devised to them. After providing for the investment of the monies in the funds until a purchase could be made, the testator declared the trusts of his real estate as follows:—viz. that the trustees should stand possessed of the said trust estate for the term of one hundred and twenty years, to be computed from his decease, if several persons named (amounting in number to twenty-eight), or any or either of them, should so long live; *and also for the term of twenty years, to be computed from the expiriaton or sooner determination of the said term of one hundred and twenty years determinable as aforesaid*, in

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trust for the testator's nephew, George Bengough, for ninety-nine years, if he should so long live, and the terms of one hundred and twenty years, determinable as aforesaid, and twenty years, or either of them, should so long continue; and, after the expiration or sooner determination of the said term of ninety-nine years, in trust for the first and other sons of the said George Bengough successively, according to the priority of their births; and, after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under or as answering to the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to such son and the heirs male of his body: to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person should so long live, and the said terms of one hundred and twenty years, determinable as aforesaid, and twenty years, or either of them, should so long continue; every elder of the same sons, and the person who for the time being and from time to time, or, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being, &c.; remainder to numerous other persons and their sons, and the persons from time to time answering to the description of heirs male of their bodies, in the same manner; with an ulterior trust for the person or persons who for the time being should answer to the description of the testator's heir or heirs at law, and, if there should be more than one, in the same shares as they would be entitled to a real estate descending from him (the testator) as

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the first purchaser; to hold to such person or persons, if more than one, as tenants in common, if the same person or persons should so long live, and the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, should so long continue. The testator then provided, that, in case the trusts could not take effect in the order intended, by reason that the persons entitled were not then born, the income during such suspension of ownership should be enjoyed by the persons next in remainder. And the testator then directed, that, after the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, the said trust estates should be settled by his trustees to and upon such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, or in tail, or in fee, in the same trust estates, if the same trust estates were by that his will devised, settled, or assured, in manner or to the effect following, that is to say, to the use of his nephew, George Bengough, and his assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male, with various remainders over. The testator then proceeded to direct that the person or persons to whom such conveyances should be made, should have such estates in the said trust estates as he or they would at that time be entitled to take under the said limitation, if actually made by his said will; yet, nevertheless, he directed and declared that no person should have a vested estate, or any other than a *contingent* interest, until the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years; and that, in the event and in the mode thereinbefore expressed, heirs and heirs of the body should be entitled to take as purchasers. The testator then directed that if, during the said terms of one hundred and

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twenty years determinable as aforesaid, and twenty years, each or either of the persons who should be entitled to the income of the said trust estates should require the same, it should be lawful for the trustees to convey to him or her an estate of freehold for his or her life, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years determinable as aforesaid. The testator also bequeathed the residue of his personal estate to the same trustees, their executors, administrators, and assigns, upon trust, during the period of twenty-one years from his decease, to receive the annual income thereof, and invest the same, and the accumulations thereof, in the 3*l.* per cent. Consolidated Bank Annuities, or upon mortgage, so as to form an accumulating fund, and from time to time lay out the same in the purchase of lands, to be settled upon the trusts before declared of his devised estates.

The question as to the validity of the devises the vesting of which was suspended for the terms of a hundred and twenty years determinable with lives, and twenty years absolutely, was raised upon a bill filed by the heir at law against the trustees. The Vice Chancellor (Sir John Leach) held the limitations in the will to be valid, observing, "that, although the rule be framed by analogy to the case of a strict settlement, where the twenty-one years was allowed in respect to the infancy of the tenant in tail, yet he considered it to be fully settled, that limitations by way of executory devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being" (*a*).

Against this decree there was an appeal to the House of Lords, upon which the following questions were submitted for the opinion of the Judges:—

First—Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or

(*a*) See *Bengough* v. *Edridge*, 1 Sim. 173.

lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly—Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the ordinary period of gestation*, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever born, or en ventre sa mere.

Thirdly—Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the longest period of gestation*, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever born or en ventre sa mere.

The unanimous opinion of the Judges was, on the 25th June, 1833, delivered by Mr. Baron BAYLEY, as follows:—

The first question proposed by your Lordships' House for the consideration of his Majesty's Judges is this—"whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *as a term in gross*, and without reference to the infancy of any person who is to take under such limitation, or of any other person;" and I am to return to your lordships the unanimous opinion of the Judges who have

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heard the argument at your lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd* v. *Carew* (*a*), in the year 1696, and *Marks* v. *Marks* (*b*), in the year 1719, established the point, that, for certain purposes, such time as with reference to those purposes might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your lordships' bar: they do not necessarily warrant an inference that a term of twenty-one years for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; and that there are cases in which it may be exceeded. *Taylor* v. *Biddall* (*c*), in the year 1677, is the first instance we have met with in the books in which so great an excess as twenty-one years after a life or lives in being was allowed; and that was a case of infancy. It was a limitation to the heirs of the body of Robert Wharton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain

(*a*) 1 Show. Parl. Cas. 137. (*b*) 10 Mod. 419. (*c*) 2 Mod. 289.

twenty-one, till which time the estate was not to vest: and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by and was the foundation of the decision in *Stephens* v. *Stephens* (*a*). That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter Mary Stephens, by my son-in-law Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns for ever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar. It refers to *Taylor* v. *Biddall*, and says, "that, however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated, they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate *might* be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross for twenty-one years, without any reference to infancy, after a life or lives

(*a*) Cas. temp. Talb. 232.

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in esse, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy: the contemporaneous understanding might have been, that it extended generally to *any* term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle* v. *Wood* (*a*), Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress. "Of late years," he says, "the doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects only they have been under some restraints to prevent perpetuities. At first it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz. to a child en ventre sa mere at the time of the father's death; because, as the contingency must necessarily happen within less than nine or ten months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being, as, in that case likewise, there is no danger of a perpetuity:" and, in citing this passage in *Thellusson* v. *Woodford* (*b*), Lord Chief Baron Macdonald prefaces it by this eulogium—"The result of all the cases is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity." He does indeed afterwards say (*c*), after noticing *Long* v. *Blackall* (*d*)—"The established length of time during which the vesting may be suspended is, a life or lives in being, the period of gestation, and the infancy of such posthumous child:" and

(*a*) Willes, 213; S. C. 7 Term Rep. 103, n.

(*b*) 1 New Rep. 388.

(*c*) 1 New Rep. 393.

(*d*) 7 Term Rep. 100.

that rather implies that he thought the rule was confined to cases of minority. This opinion, though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person in esse, without reference to minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman* v. *Goodright* (*a*), Lord Chief Justice Mansfield says—"It is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after—which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice Mansfield or of the reporter, it was calculated to draw out some contradiction or explanation if that were not generally understood by the profession as the correct limit. In *Buckworth* v. *Thirkell* (*b*), Lord Mansfield says: "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards." In *Gee* v. *Audley* (*c*), Lord Kenyon (Master of the Rolls) says: "The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of the Judges of all times, from *The Duke of Norfolk's* case (*d*) to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long* v. *Blackall* (*e*), the same

(*a*) 2 Burr. 873.

(*b*) 3 Bos. & Pul. 654, n. See a full report of this case in 10 J. B. Moore, 235, n.

(*c*) 1 Cox, 325.

(*d*) 3 Chan. Cas. 1.

(*e*) 7 Term Rep. 102.

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learned Judge says: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements, the estate may be limited to the first and other sons of the marriage, in tail; and, until the person to whom the last remainder is limited is of age, the estate is unalienable. In conformity to that rule, the Court have said, so far we will allow executory devises to be good." And, after referring to *The Duke of Norfolk's* case, he concludes: "It is an established rule that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson* v. *South* (*a*), Lord Kenyon again says—"The rule respecting executory devises is extremely well settled, and a limitation by way of executory devise is good, if it may [I think it should be *must*] take place after a life or lives in being, and within twenty-one years and the fraction of another year afterwards." We would not wish the House to suppose that there were not expressions in other cases about the same period, from which it might clearly be collected that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they did, without expressing

(*a*) 7 Term Rep. 558.

minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (*a*), puts as the limit of executory devises, that "the contingencies ought to be such as may happen within a reasonable time, as, within one or more life or lives in being, or within a moderate term of years; for, Courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in is, that of a life or lives in being, and twenty-one years afterwards; as, when lands are devised to such unborn son of a feme coverte as shall first attain twenty-one, and his heirs, the utmost length of time that can lapse before the estate can vest, is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise." Mr. Fearne, in his elaborate work upon Executory Devises (*b*), lays down the rule in the same way—"An executory devise to vest within a short time after the period of a life in being, is good"—as in *Lloyd* v. *Carew*, which he states, and *Marks* v. *Marks:* and he says—"The Courts, indeed, have gone so far as to admit of executory devises limited to vest within twenty-one years after the period of a life in being, as in *Stephens* v. *Stephens*, *Taylor* v. *Biddall*, *Sabbarton* v. *Sabbarton* (*c*); all of which he states, and in all of which the vesting was postponed on account of minority only: and then he draws this conclusion—"So that the law seems to be now settled, that an executory devise, either of real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and

(*a*) 2 Bl. Com. 174. (*b*) Fearne, p. 129.
(*c*) Cas. temp. Talb. 55, 245.

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this appears to be the longest period yet allowed for the vesting of such estates." The instances put—all instances of minority—might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was the understanding of Mr. Fearne, may be collected from many other passages in his book, but from none more distinctly than in the third division of his first chapter on Executory Devises (*a*); where, after having mentioned as the second sort of executory devises those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he concludes the division thus: "And in the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose,) next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises." And in his third chapter (*b*), he begins his eighth division with this position—"It is the same (that is, that an executory devise is not too remote,) if the dying without issue be confined to the compass of twenty-one years after the period of a life in being." And in the eighth division of the fourth chapter (*c*), he says: "It seems now to be settled, that, whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in the event of no one of the preceding limitations which would carry the whole interest

(*a*) Fearne, 9th edit. pp, 399, 401. (*b*) Id. p. 470. (*c*) Id. p. 517.

happening to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson* v. *Woodford* (*a*), shewing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration. But it does not appear to me, from any thing expressed by his great and experienced editor (Mr Butler), or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated that his opinion was in conformity to it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was, that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard* v. *Westcott* (*b*), the question whether an executory devise was good though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir William Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812, the next in November, 1813; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs—men of great experience, and some of them very

(*a*) 4 Ves. 337. (*b*) 5 Taunt. 393.

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familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench; and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote: but the foundation of their certificate was, that a previous limitation clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceeding limitation; and, because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion upon that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas in *Beard* v. *Westcott*, and the dicta by Lord Chief Justice Willes, Lord Mansfield, and Lord Kenyon, and the rules laid down in Blackstone and Fearne, we consider ourselves warranted in saying that the limit is, a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatsoever. This will certainly render the estate unalienable for twenty-one years after lives in being: but it will preserve in safety any limitations which may have been made upon the authority of the dicta or

text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your lordships—whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever born or en ventre sa mere—the unanimous opinion of the Judges is, that such a limitation would be void as too remote. They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists.

The LORD CHANCELLOR coinciding in the opinion of the Judges, the judgment of the Court below was affirmed.

Judgment affirmed.

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Doe on the demise of Winter *v.* Perratt.

Testator, after giving his T. estate to certain persons for life, devised it "to J. C., or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said J. C., then the above lands to fall to the *first male heir of the branch of my uncle R. C.'s family*, yielding and paying unto such of the daughters of the aforesaid R. C. which shall be then living the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." At the time when the will was made R. C. was dead, having left five daughters, all married. The eldest daughter of R. C. died in 1799, leaving a daughter who had a son born in 1795—the second died in November, 1820, leaving a son, born in 1770—the third died in 1813, leaving a son, born in 1773—the fourth died in 1806, leaving a son, born in 1768—the fifth survived, having a son (also living) born in 1772. J. C. died without issue in 1808. The tenant for life died in July, 1820:—*Held*, first, that the remainder to the first male heir of the branch of the family of the testator's uncle R. C., was a remainder in fee-simple—Secondly (Mr. Justice Littledale dissenting), that the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living—Thirdly, that the remainder vested in interest on the death of the eldest daughter of R. C.—Fourthly—per Mr. Justice Taunton and Mr. Justice Bosanquet, that the remainder then vested in the grandson of R. C.'s eldest daughter—per Mr. Justice Littledale, that it vested in the son of the fourth daughter of R. C.—per Mr. Baron Bayley, that it vested in the son of the second daughter—per Lord Chief Justice Tindal, that the devise was void for uncertainty—Fifthly, that the remainder, if once vested in interest, could not open or become divested so as to admit another person in preference to the person in whom it had so vested.

THREE actions of ejectment were brought to recover certain lands situate in the county of Somerset, to which the lessors of the plaintiff respectively claimed to be entitled under the will of one Emanuel Chilcott. At the trial, the jury found a special verdict in each cause, which stated in substance as follows:—

On the 16th March, 1786, Emanuel Chilcot twas seised in his demesne as of fee of certain tenements known by the name of the Truckwell estate, being the tenements in the declaration mentioned; and, being so seised thereof, afterwards, to wit, on the day and year aforesaid, duly made and published his last will and testament in writing, bearing date, &c., and signed by him, and attested and subscribed in his presence by three credible witnesses; and thereby, amongst other things, devised as follows:—

"I give unto John Chilcott, my kinsman, living in London, 100*l.*, to be paid in one year after my decease; [several small legacies were then given]; also I give unto Ann White, my sister-in-law, the sum of 20*l.* and the income of Burge's cottage, and her living in it if she thinks proper, during her natural life: also I give unto Eleanor White 100*l.*, and half of Truckwell estate during her natural life: also I give unto William Burge, my servantman, 5*l.* All the rest and residue of my goods, chattels,

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rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise, and bequeath unto Elizabeth Chilcott, my dearly beloved wife, during her natural life, whom I make my whole and sole executrix. And I do allow her the said Elizabeth Chilcott to give what she thinks proper of her said effects to her sisters Eleanor White and Ann White, during their natural lives. And, after the above lives have expired, that is to say, Elizabeth Chilcott, Eleanor White, and Ann White, all the lands, rights, profits, and hereditaments of Truckwell estate to come to John Chilcott, my kinsman, living in London, or his male heir if any, free land, not to be sold nor mortgaged on any account whatever, but to remain in the Chilcotts' family for land of inheritance; with two cottages, garden, and orchard, in the parish of Brompton Ralph, adjoining to the aforesaid Truckwell estate, called by the name of Middle Witcombe, free land. And if no male heir lawfully begotten by the said John Chilcott, then the above lands to fall *to the first male heir of the branch of my uncle Richard Chilcott's family*, who lived at Hancrick farm, yielding and paying unto such of the daughters of the aforesaid Richard Chilcott which shall be then living the sum of 100*l.* each at the time of the taking possession of the aforesaid estates."

Devise to E. Chilcott, for life.

Remainder to John Chilcott, testator's brother, or his male heir, if any.

If no male heir of John Chilcott, then "to the first male heir of the branch of testator's uncle Richard Chilcott's family."

Emanuel Chilcott, on the 24th May, 1787, died so seised of the said tenements, with the appurtenances, without revoking or altering his said will, and without issue, leaving the said Elizabeth Chilcott, his widow, and the said Anne White and Eleanor White, him surviving; whereupon and whereby the said Eleanor White became and was seised of one moiety of the said tenements called Truckwell estate, with the appurtenances, in her demesne as of freehold for and during the term of her natural life; and the said Elizabeth Chilcott became and was seised of the other moiety of the said tenements, with the appurtenances, in her demesne as of freehold for and

Death of the testator.

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during the term of her natural life. Ann White died on the 9th April, 1791, leaving the said Elizabeth Chilcott and Eleanor White her surviving; and, on the 23rd April, 1792, Elizabeth Chilcott duly made and published her last will and testament in writing, bearing date the and year last aforesaid, and signed by her the said Elizabeth Chilcott, and attested and subscribed in her presence by three credible witnesses; and thereby, amongst other things, devised, and in pursuance of all and every power and powers enabling her in that behalf, gave and devised all those the said tenements comprised in the said Emanuel Chilcott's will over which she had any power of disposition, to her sister Eleanor White, and her assigns, for and during thet erm of her natural life.

Death of the testator's widow.

On the 25th December, 1795, Elizabeth Chilcott died so seised of the last-mentioned moiety of the said tenements called Truckwell estate, with the appurtenances, without revoking or altering her said will; whereupon and whereby the said Eleanor White became and was seised of the entire of the said tenements, with the appurtenances, in her demesne as of freehold for and during the term of her natural life: and, on the 14th July, 1820, Eleanor White died so seised of the said tenements, with the appurtenances.

Eleanor White died July 14, 1820.

Death of John Chilcott, leaving a daughter, Sarah.

John Chilcott in the will of Emanuel Chilcott mentioned (which said John Chilcott was the heir-at-law of the said Emanuel Chilcott), in the year 1765, intermarried with one A. B., and afterwards and in the life time of the said Eleanor White, in December, 1808, died, without ever having had any male heir by him lawfully begotten, and without having levied a fine or suffered a recovery of the tenements aforesaid, with the appurtenances, or any part thereof; but the said John Chilcott had issue one Sarah Chilcott, his only daughter; and, in the year 1789, the said Sarah Chilcott intermarried with one Thomas Webb, by whom she had issue one John

Sarah married Thomas Webb, had issue J. C. Webb, and died April 4, 1810.

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Chilcott Webb, her only son; and, on the 4th April, 1810, the said Sarah Webb died; whereupon and whereby the said John Chilcott Webb became and was heir-at-law of the said Emanuel Chilcott. John Chilcott Webb, after the death of his mother Sarah Webb, to wit, on the 13th August, 1814, by a certain indenture, bearing date the day and year last aforesaid, and made between the said John Chilcott Webb and Louisa his wife, of the one part, and William Gray, late of Crewkerne, in the county of Somerset, since deceased, of the other part, for the considerations therein mentioned, demised the said tenements called Truckwell estate, with the appurtenances, to the said William Gray, his executors, administrators, and assigns, for the term of one thousand years; and it was by the said indenture declared that a certain fine sur conuzance de droit come ceo &c., with proclamations, levied of the said premises by the said John Chilcott Webb and Louisa his wife, should enure to and to the use of the said William Gray, his executors, administrators, and assigns, during the said term of one thousand years, and, subject thereto, to the only proper use and behoof of the said John Chilcott Webb, his heirs and assigns for ever. The said William Gray, on the 21st October, 1815, duly made and executed his will, and thereby, without specifically devising or bequeathing the said tenements, with the appurtenances, or any part thereof, after certain devises and bequests, devised and bequeathed all the residue of his real and personal estate to John Slade, his executors, administrators, and assigns, and appointed him sole executor of his said will; and the said William Gray, on the 13th August, 1817, died without altering or revoking the same; and the said John Slade, on the 17th December, 1817, duly proved the said will in the Prerogative Court of the Archbishop of Canterbury, and took upon himself the execution thereof; whereupon and whereby the said John Slade, after the

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death of the said Eleanor White, to wit, on the said 20th July, 1820, aforesaid, entered into the tenements, claiming the same, and was possessed thereof as the law required; and, being so possessed thereof, he the said John Slade afterwards, to wit, on the said 1st December, 1820, demised to John Goodtitle, &c.

J. C. Webb died April 22, 1820, intestate, leaving a son, John Staines Webb.

On the 22nd April, 1820, the said John Chilcott Webb died intestate, leaves John Staines Webb, his only child and heir-at-law; whereupon and whereby the said John Staines Webb, after the death of the said Eleanor White, to wit, on the 20th July, 1820, entered into the said tenements, claiming the same, and was possessed thereof as the law required; and, being so possessed thereof, he the said John Staines Webb, afterwards, to wit, on the said 1st of December, 1820, demised the said tenements, with the appurtenances, to the said John Goodtitle, &c.

Death of Richard Chilcott, leaving five daughters.

In the life time of the said Emanuel Chilcott, viz. on the 17th March, 1780, the said Richard Chilcott, the uncle of the said Emanuel Chilcott, who lived at Hancrick-farm, in the said will of Emanuel Chilcott mentioned, died, without ever having had a son, leaving five daughters only, that is to say, Mary, who was born on the 9th of November, 1739; Joan, who was born on the 1st January, 1741; Sarah, who was born on the 4th December, 1744; Betty, who was born on the 25th October, 1746; and Agnes, who was born on the 13th February, 1749; and which said daughters were all living at the time of the making of the will of the said Emanuel Chilcott, and at the time of his death; and as well the said five daughters, as the several descendants of the said daughters respectively hereinafter mentioned, who were born before the making of the said will of the said Emanuel Chilcott, were all well known to him at the time of making his said will.

The state of the family known to Emanuel Chilcott at the time of making his will.

Mary, eldest daughter of R. Chilcott, married G. Bishop.

On the 6th June, 1768, the said Mary Chilcott, the eldest daughter of the said Richard Chilcott, intermarried

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with one George Bishop, by whom she had issue four daughters only, and no other issue, that is to say, Betty, who was born on the 6th August, 1769; Ann, who was born on the 11th October, 1770; Mary, who was born on the 11th January, 1772; and Anna, who was born on the 2nd August, 1781. Mary Chilcott, afterwards Bishop, in the life time of the said Eleanor White, in the year 1799, died. On the 1st May, 1794, the said Betty Bishop, the eldest daughter of the said Mary Bishop, intermarried with John Derham Perratt, by whom she had issue, the defendant, Matthew Perratt, her eldest son and heir-at-law, who was born on the 3rd March, 1795; and which said Betty Perratt and Matthew Perratt are still respectively living.

Mary died in 1799.

Betty, their eldest daughter, married I. D. Perratt, and had issue M. Perratt, the defendant, born March 3, 1795, who, with his mother, still survive.

On the 14th May, 1762, the said Joan Chilcott, second daughter of the said Richard Chilcott, intermarried with one Isaac Winter, by whom she had issue two sons, viz. Thomas Chilcott Winter, who was born on the 18th February, 1763, and Isaac Winter, who was born on the 15th July, 1770, both of whom were also well known to the testator; and afterwards, and after the death of the said Eleanor White, to wit, on the 8th November, 1820, she the said Joan Chilcott, afterwards Winter, died. In the respective life times of the said Eleanor White, and the said Joan Chilcott, afterwards Winter, to wit, on the 30th December, 1817, the said Thomas Chilcott Winter died, a bachelor and intestate, leaving the said Isaac Winter, his brother and heir-at-law, him surviving.

Joan, second daughter of Richard Chilcott, married Isaac Winter, and had issue two sons, T. C. Winter, and Isaac Winter, the latter born July 15, 1770.

Joan died 8th Nov. 1820.

T. C. Winter, died a bachelor, 30th Dec. 1817.

On the 3rd April, 1769, the said Sarah Chilcott, the third daughter of the said Richard Chilcott, intermarried with one Samuel Parsons, by whom she had issue two sons, viz. James Parsons, who was born on the 3rd October, 1771, and John Parsons, who was born on the 4th January, 1773; and afterwards, and in the life time of the said Eleanor White, to wit, on the 4th August, 1813, she the said Sarah Chilcott, afterwards Parsons, died; and af-

Sarah, third daughter of Richard Chilcott, married S. Parsons, and had issue James and John (the latter born Jan. 4, 1773), and died Aug. 4, 1817.

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terwards to wit, some time in the year 1813, the said James Parsons died intestate and without issue, leaving John Parsons, his brother and heir-at-law, him surviving.

Betty, fourth daughter of Richard Chilcott, married R. Viney. and had issue a son, Thomas, born March 5, 1765.

Betty died, Feb. 24, 1804.

On the 4th August, 1764, the said Betty Chilcott, the fourth daughter of the said Richard Chilcott, intermarried with one Benjamin Viney, by whom she had issue Thomas Viney, her only son, who was born on the 5th March, 1765; and the said Betty Chilcott, afterwards Viney, afterwards and in the life-time of the said Eleanor White, to wit, on the 24th February, 1804, died, leaving the said Thomas Viney, her only son and heir-at-law, her surviving.

Thomas Viney married, and had issue a son, Thomas.

Thomas Viney, the father, devised all his real estate to his widow Catherine, her heirs and assigns for ever; and died in Sept. 1819.

Thomas Viney afterwards, and in the life-time of the said Eleanor White, to wit, some time in the year 1795, intermarried with one Catherine Phelps, by whom he had issue one son, Thomas Viney, who is still living; and the said Thomas Viney the father, afterwards, on the 15th July, 1819, duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and signed by three credible witnesses, according to the form of the statute in such case made and provided, and thereby gave and devised all his real estate to the said Catherine Viney, her heirs and assigns for ever. Thomas Viney, the father, afterwards, and before the said time when &c., to wit, in the month of September, 1819, died, without revoking or altering his said will, leaving the said Catherine Viney, his widow, and the said Thomas Viney, his only son and heir-at-law, him surviving.

Agnes, fifth daughter of Richard Chilcott, married J. Greenslade, and had issue a son, Thomas, born Dec. 10, 1772.

J. Greenslade died in 1780.

On the 11th November, 1770, Agnes Chilcott, the fifth daughter of the said Richard Chilcott, intermarried with one John Greenslade, by whom she had issue Thomas Greenslade, her only son, who was born on the 10th December, 1772, and afterwards, to wit, some time in the year 1780, the said John Greenslade died, leaving the said Agnes his widow, and the said Thomas Greenslade, his son, him surviving, both of whom are still living.

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Upon this special verdict, the judgment of the Court of King's Bench was, in Hilary Term, 6 & 7 Geo. 4, pronounced in favour of the claim of Thomas Viney, the son of Betty, the fourth daughter of Richard Chilcott, who was born on the 5th March, 1765, and whose mother died on the 24th February, 1804—on the opinions of Mr. Justice Holroyd and Mr. Justice Littledale—dissentiente Mr. Justice Bayley, who held that Isaac Winter was entitled, he being the son of the eldest of the five daughters of Richard Chilcott who had a son.

The judgment of the Court, therefore, was given for the lessor of the plaintiff, on the demise of Catherine Viney, and for the defendant in the other ejectments. The record being removed by writ of error to the House of Lords, the following questions were submitted for the opinion of the Judges:—

1. Whether, under the circumstances disclosed on the special verdict, the remainder to the first male heir of the family of the testator's uncle, Richard Chilcott, was a remainder in fee simple or fee tail.

2. Whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living.

3. At what time did the remainder vest in interest.

4. In what person did the remainder first vest in interest.

5. Whether the remainder, if once vested in interest in any person, could afterwards open, or become divested, so as to admit another person in preference to the person in in whom it had so vested.

After hearing the case argued at the bar of the House, five of the Judges delivered their opinions as follows:—

Mr. Justice TAUNTON.—Before I proceed to answer seriatim the questions propounded by your lordships to the Judges, I must observe, that, if the words "male

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heir" in the limitation to "the first male heir of the branch of my uncle Richard Chilcott's family," be construed in its strict technical sense, the limitation must fail altogether; for, there never has in that sense been such a male heir. In a will, the words heir male of A. mean heir male of the body of A.—*Lord Ossulston's* case (*a*); and, though that simple form of expression be not used in this will of Emanuel Chilcott, yet I take it the words "male heir of the branch of my uncle Richard Chilcott's family," in effect, are the same as "male heir of the body of my uncle Richard Chilcott." This Richard Chilcott at his death left five daughters, and had no son; and, although four of the daughters married and had sons, yet, as the known rule of law is, that, under such a limitation, the title must be derived entirely through males (*b*), it is obvious that no male heir of the body of Richard Chilcott has ever come into esse, nor ever can. If, therefore, the law will permit some other person than a male heir (properly so called) to be substituted, the limitation may take effect; and the Courts of law are bound to find out what person, under the circumstances, is best entitled; or otherwise the will as to this part is void. In any way of considering this case, it is impossible to say that there are not serious difficulties; and no opinion can be given without considerable doubts. But effect, if possible, must be given to the will, rather than it should fail; and, in order to do this, I think the words "first male heir" must be construed to mean "first male descendant." Richard, the uncle, died in the life-time and six years before the death of the testator; and the testator knew that he had left only daughters, and that Joan, one of them, who married Isaac Winter, had two sons. It is not to be presumed that he meant nothing by this devise to the branch of his uncle Richard's family. He must, then, have intended by the term "first

(*a*) 3 Salk. 336. (*b*) Litt. ss. 24, 25. b.

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male heir" some other person than one strictly coming within this appellation.

I have premised these general observations, because it appears to me they furnish a key to many of the questions proposed.

First question. —The remainder is a remainder in fee simple.

In answer to the first question, my humble opinion is that the remainder is a remainder in fee simple, and not in tail. The term here "first male heir" is a word of purchase, and a mere designation of the person who was to take. It is in the singular number, and excludes plurality (*a*). In this respect it resembles the limitation in *Archer's* case (*b*), of "next heir male of A.;" in *Clerk* v. *Day* (*c*), of "daughter's heir;" in *Walker* v. *Snowe* (*d*), of "right heir male of Sir E., to be begotten after the sixth son." In effect, it is the same as if the devise had been to one by name, but, being without words of limitation, which accompanied the several devises in the cases above mentioned, the remainder could have been only for life, if it had ended there. But the charge created by the words "yielding and paying unto such of the daughters of the aforesaid Richard Chilcott which shall be then living the sum of 100*l.* each," enlarges the interest to a fee. It has been argued at your lordships' bar, that, where there is a gift to a special heir, as heir male, it must give an estate tail; for, such a gift defines the line of descent in which the estate is to go. And this, in some cases, where the word "heir" is used in the strict sense of heir, undoubtedly is so. Thus, in *Mandeville's* case (*e*), where John De Mandeville by his wife Roberge had issue Robert and Maude. Michael De Mereville gave certain lands to Roberge and to the heirs of John De Mandeville, her late husband, on her body begotten; and it was adjudged

(*a*) See *Perriman* v. *Pierce*, Palmer, 303.
(*b*) 1 Rep. 66.
(*c*) Moore, 593.
(*d*) Palmer, 359.
(*e*) Co. Litt. 26. b.

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that Roberge had an estate but for life, and the fee tail vested in Robert (heir of the body of his father being a good name of purchase), and that then, when he died without issue, Maude, the daughter, was tenant in tail of the body of her father, per formam doni. "In which case it is to be observed," says Lord Coke, "that, albeit Robert, being heir, took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land per formam doni, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift: and therefore when the gift was made she took nothing but in expectancy, when she became heir per formam doni." So, in the case of a gift to a man and the heirs of the body of his ancestor, the donee by reason he is named will take an estate for his own life, and, under the limitation to the heirs of the body, an estate in tail will execute in the person who can bring himself within that description. If the donee himself answer the description of heir of the body of the ancestor, it will for that reason execute in himself; if another person be the heir of the body of the ancestor, then in that other person. Thus, where A., having two sons, B. and C., covenanted to stand seised to the use of B. and the heirs male of his body on M. his wife to be begotten, and, for want of such issue, to the heirs male of his, A's., own body, and, for want of such issue, to his own right heirs for ever; B. the eldest son died, leaving issue one son and several daughters; A. died, and the son of B. died without issue: the Court held the limitation to the heirs male of the body of A. to be words of purchase, and to vest in the son of B., upon the death of A., as heir male of his body, by purchase; and that, on the death of B.'s son, it descended to his uncle C., as heir male of the body of A., per formam doni—*Southcote* v. *Stowell* (*a*). But, in

(*a*) 1 Mod. 226, 237; 2 Mod. 207.

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these instances, the estate tail arises out of proper words of limitation in the plural number, denoting a certain continuous line of posterity—" heirs of the body." But no such effect can be given to the words " heir," " heir of the body," " right heir," or " next" or " first heir," where they constitute only a mere designatio personæ. This distinction between the remainder being in fee or in tail is very material in this instance; because, if it were in tail, it is clear the words of charge would not enlarge the interest to a fee; and the consequence would be, that, if Thomas Viney was a mere tenant in tail, the devise to the widow Catherine would be inoperative, though, if the several sons of the daughters could be considered as very heirs male of the body of Richard, the uncle, under a limitation to such heirs male, Isaac, the brother of Thomas Chilcott Winter, would, although a collateral, succeed to him, as coming under that denomination. That none of the male issue of the four daughters took an estate tail, is I think perfectly clear; and I have noticed this point so much at length in deference only the authority of the gentlemen who suggested it at the bar.

Second question.—" First male heir" used to denote a person of whom an ancester might be living.

With respect to the second question, I think the expression " first male heir" was used by the testator to denote a person of whom an ancestor might be living. The general will is rule known—nemo est hæris viventis—that is, the law recognizes no one as heir until the death of his ancestor. A party may be heir apparent or heir presumptive, but he is not very heir, living the ancestor; and therefore, where an estate is limited to one as a purchaser under the denomination of " heir," " heir of the body," " heir male," or the like, according to this rule, the party cannot take as a purchaser, unless by the death of the ancestor he has at the time when the estate is to vest become very heir. But this rule has been relaxed in many instances; and an exception has been engrafted on it, that, if there be sufficient (which Lord Hobart, in *Covenden* v.

The word " heir" in a devise may be construed to mean " heir apparent."

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Clarke (*a*), defines to be "declaration plain,") on the will to shew that the word "heir" is used in such a way as to shew that the testator meant "heir apparent," it shall be so construed. In such case, the popular sense shall prevail against the technical. The principal cases which established this are *Burchett* v. *Durdant* (*b*), *Darbison* d. *Long* v. *Beaumont* (*c*), and *Goodright* v. *White* (*d*). These cases have been so fully commented on in the judgments of the learned Judges in the Court below, and by the counsel at your lordships' bar, that it is unnecessary for me to detail the facts. It is sufficient for me to observe, that, in my opinion, the circumstances in the case now under discussion afford declaration plain as in any one of these. These circumstances are, the testator's knowledge of the state of his uncle Richard's family; that his uncle was dead; that he left no heir male, but only daughters; the bequest of legacies to such of the daughters as should be living at the time of the remainder vested, to be paid by the person who was to take under the description of "first male heir;" and the terms of the devise itself, which are "first male heir," not "of my daughters," or "of daughters," or of any one daughter specifically, but "of the branch of my uncle Richard Chilcott's family." Out of these facts, these considerations arise—that the testator clearly meant that the devisee should take, not with reference to his character as heir male, but as male descendant of some one of the daughters, whether they should be living or dead; for, though it is true that he contemplated the possibility of some dying before the vesting of the remainder, yet, if all were living, according to the will, all were to receive legacies and to be paid by the very devisee himself—the heir, that is, of a living ancestor. Again, if

(*a*) Hob. 33, in margin.
(*b*) 2 Vent. 311—elsewhere reported, nom. *James* v. *Richardson*.
(*c*) 1 P. Wms. 229.
(*d*) 2 Sir W. Blac. 1010.

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this be deemed impossible, and no son of a living daughter were capable of taking, the consequence would be, that, if all the daughters of Richard the uncle had been living at the determination of the particular estate, or, if all had died without issue save one, and that one had a son; in either case, the remainder must have failed, and the legacies would have been lost, although, in the first supposition, all the legatees would have been living; and, in the other, the son would have been the only possible male heir that could have come into existence. The testator, therefore, contemplated the possibility of the remainder vesting during the lives of the daughters. Under these circumstances, I am satisfied that there is enough to shew that the testator used the word "heir," not in its strictly legal, but in its popular acceptation. I have already observed, that, if the word be here used in its former sense, the will in this part must be inoperative, because, supposing Thomas Viney to be preferable, as born before John Parsons, and being from the death of his mother her very heir when the particular estate determined, so that the maxim of nemo est hæris viventis could not be applicable, yet still he would not be heir male of the branch of the uncle Richard's family, for, all the five daughters of Richard as co-parceners made altogether only one heir, and the living sisters of his mother, or the issues of such as were dead, would according to the common law be parceners with him in a course of descent from Richard. But the testator, by the words "first male heir," intended that the remainder should vest in one only; and this furnishes another proof that the strict definition of the term "next male heir" is not consistent with the intention of the testator.

Third question.—The remainder vested in interest on the death of Mary, the eldest

In answer to the third question, I have to say, that, in my opinion, the remainder vested in interest on the death of Mary, the eldest daughter of Richard, the uncle. This depends in some degree upon the answer to the

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fourth question. The testator, I think, anticipated some future event whereby the vesting of the remainder should be governed. He has said, that if, at the expiration of the estates for life, there should be no heir male lawfully begotten of John Chilcott, then the lands should fall to such person as at that time should be first male heir of the branch of his uncle Richard's family. The remainder, therefore, was necessarily contingent, and waited until it could be seen who should turn out to be "first male heir;" and, as soon as the possibility ceased of a better male heir coming into the world, the remainder vested in interest in the person who at the moment of that possibility ceasing was the first, or, in my construction, the best and most worthy, heir male. This event happened on the death of Mary Bishop. Until then she might in contemplation of law have borne a son whose birth would have superseded the titles of the issue of the other sisters respectively. But afterwards no better "first male heir" could be born than then existed in some one instance of the daughters' issues. In any way of putting the case, either Matthew Perratt, Thomas Chilcott Winter, or Thomas Viney, must have been entitled.

daughter of Richard, the uncle.

Fourth question.—The remainder first vested in Matthew Perratt—he being the representative of the eldest branch of the uncle's family.

"First male heir" means, not first in order of birth, but first in dignity and worthiness of blood.

With respect to the fourth question, which is the most perplexing, I am of opinion that the remainder first vested in Matthew Perratt, the son of Elizabeth, the eldest daughter of Mary, who was the eldest daughter of Richard, the uncle; and this upon the ground that he is the representative of the eldest branch of the uncle's family. I think "first male heir" means, not first in order of birth, but first in dignity and worthiness of blood. In order of birth, Thomas Chilcott Winter was the first male of the branch of Richard's family: and, although the testator knew of his and his brother's existence, he passed them by. If he had meant that the remainder should vest absolutely in either of them, there was no reason why he should not have named them with proper limitations to the issue

of the other daughters, to meet the possible event of their death. But, if the first born male was not as such intended by the testator, there is no ground for supposing that he could have contemplated with certainty any subsequent born male in a lower degree of worthiness. It is to be recollected that not one of these descendants completely answers the description of the person in the will. But Lord Hale says, in *Pibus* v. *Mitford* (*a*), that, where the construction cannot be to the very letter of the condition, it shall be in another manner, but as near the intent as may be. In Coke Littleton (*b*), this case is put: "If land be devised to one for life, the remainder to the next heir male of B. in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and daughters die; some say this remainder is void for uncertainty; some say the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heir." This shews the preference given by the opinion of some to the issue of the eldest daughter in that case. In *Perriman* v. *Byford* (*c*), the case was—Harper, having three daughters, devised his land to his two youngest for life, the remainder proximo consanguinitatis et sanguinis of the devisor, and died. The youngest, having issue, died. The issue continued in possession. The eldest daughter entered claiming as proxima de sanguine of the devisor; whereupon he brings trespass. And the question was, whether the remainder was to the eldest daughter alone, or to all the daughters together. There, Mr. Justice Montague thought the eldest daughter alone should have it; for, though all the daughters are equal in proximity, as all are the children of the devisor, yet the intention of the testator is expressed in the singular; and so it appeared that by the will only one should be the elder, which one is the eldest sis-

(*a*) 1 Vent. 381. (*b*) Co. Litt. 25. b. (*c*) Palmer, 11.

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ter. In Hale's MSS. (*a*), the case is somewhat differently stated: thus: "Harper, having a son and four daughters, viz. A., B., C., and D., devises to the son in tail, remainder to B. and C. for life, remainder proximo consanguinitatis et sanguinis of the devisor; and Easter, 17 James, by two Justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards, Michaelmas, 20 James, per totam Curiam, it vests in the eldest daughter only, and not in all the daughters—first, because proxima—secondly, because an express estate is limited to two of the daughters—*Perriman* v. *Pierce*." If the limitation here had been to the "first heir," and not to the "first male heir," and the question had been between the five daughters, this authority appears to determine it in favour of the eldest; and if, as between the daughters, Mary would be entitled to preference, Matthew Perratt, as her representative, is equally so. But against this it may be said that Matthew Perratt is one degree further removed from Richard Chilcott than Thomas Chilcott Winter, whose brother and heir, Isaac Winter, the lessor of the plaintiff is; and therefore that Isaac Winter's title is the better one. And for this may be cited a passage in Coke Littleton (*b*), where Lord Coke, having illustrated the difference between right of representation and right of propinquity in the law of descent, and given the preference to the right of representation, though the party be more distant, says: "But here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore, in the case before mentioned, if a lease for life were made to A., the remainder to his next of blood in fee: in this case, as hath been said, D. shall take the remainder, because he is next of blood, and capable by purchase, though he be not legally next to take as heir by descent." The like is laid

(*a*) Cited in Hargreave's Co. Litt. 10. b., n. 6. (*b*) Co. Litt. 10. b.

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down in Brooke's Abridgment (*a*). But to this I answer that the remainder here is, not to the next of blood of Richard, the uncle, but to the "first male heir," which leaves the question open, in what sense "heir male" is to be first. I think first in the character of heir, that is, by right of representation, in worthiness and dignity of blood, and not in nearness of kindred. And this will be expounding the will according to the before-mentioned rule of Lord Hale, in *Pibus* v. *Mitford*.

Fifth question. The remainder, if once vested in interest in any person, could not open or become divested.

In answer to the fifth question, I am of opinion that the remainder, if once vested in interest in any person, could not open or become divested, so as to admit another person in preference to the person in whom it had so vested. There are instances in which a remainder may open and let in newly-accruing interests, as where a contingent remainder is limited to the use of several who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet it shall divest as to the *proportions* of persons afterwards becoming capable, after the determination of the particular estates (*b*).

On the death of Mary Bishop, the remainder vested in Matthew Perratt as a purchaser.

Under the circumstances of this case, it is not necessary to pursue this doctrine at length. Here, the remainder was contingent until the death of Mary Bishop; and it then, I think, vested in Matthew Perratt as a purchaser. The general rule is, that, when a remainder once vests in one as a purchaser, it shall not afterwards divest on the birth of a nearer heir (*c*), but shall run in a course of common descent—*Southcote* v. *Stowell* (*d*). Here, then, if it had once vested in any other person as the first heir male, it would not have opened or been divested, to let in Matthew Perratt.

Mr. Justice BOSANQUET.—The answers to be given to

(*a*) Title "Done et Remainder," pl. 20.

(*b*) Fearne Cont. Rem. 461.

(*c*) Bro Abr. tit. "Done et Remainder," pl. 21.

(*d*) 1 Mod. 226.

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the several questions proposed by your lordships depend so much upon each other that I must request permission first to examine the various points which they appear to me to involve, and, having so done, to offer my humble opinion upon each question proposed, as the result of such examination.

In attempting to put a construction upon a will so singular as that which I am now required to expound, I could not venture with confidence to pronounce a very decided opinion, even if I were ignorant that opinions different from my own had already been judicially declared. In obedience, however, to your lordships' commands, I have endeavoured to ascertain the legal effect of the testator's disposition; and, having formed an opinion in favour of the claim of Matthew Perratt, the grandson of the eldest daughter of Richard Chilcott, I do not think myself at liberty to say that the terms of the instrument are too ambiguous to admit of reliance being placed upon any interpretation of it, though it is by no means impossible, that, when your lordships shall have heard the different opinions which prevail among the Judges, your lordships should be induced to consider all the constructions suggested by them as too uncertain to exclude the claim of the heir at law.

The devise to the "first male heir," being followed by words of charge upon the person of the individual to whom the estate is limited, carries a fee.

The first point to be considered is, what estate in remainder has the testator given by the devise to the first male heir of the branch of his uncle Richard Chilcott's family. The words "male heir," as here used, designate some particular person who is to take in remainder after the termination of another estate. Such words may be used as descriptive of an individual, as well as any other term, if apparently used with that intent; and, as there are no words which give or imply a preceding freehold, they must operate as words of purchase. They are followed by no words of limitation. They do not of themselves import a description of a class of persons, but are

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in the singular number, and in terms confined to an individual person. Standing alone, therefore, they would not carry any estate of inheritance. A devise to the heirs of the body of J. S., indeed, will carry an estate tail per formam doni, under which the devisee would take in the same manner as if the estate had descended to him from J. S. Yet, supposing the words "male heir of J. S." in a will to have the same effect as "heirs of the body of J. S.," still, if it shall appear, as I think it must, for the reasons hereafter given, that the devisee could not represent Richard Chilcott or his daughters in such a way as to have taken the estate by descent if first given to Richard Chilcott or his daughters, the devisee cannot take an estate tail. Considering the words, then, as descriptive of an individual, and prima facie carrying only an estate for life, yet, being followed by words of charge upon the person of the individual to whom the estate is limited, he will take a fee notwithstanding the absence of words of limitation.

As to the description of person the testator designated by the words used.

The next point to be considered is, what description of person did the testator designate by the words which have been used. According to a general and long established rule of law, a person does not take by purchase, even under a will, by the words "heir male," unless he be also very heir as well as male. He may take as heir male by purchase though he claims through a female, which he could not do by descent: but, according to the above general rule, he must be heir general, as well as male. This rule, however, like other general rules respecting the interpretation of wills, is not so inflexible that it may not be relaxed, if the testator's intention to the contrary appear by demonstration plain. It may be admitted that words of art are to be construed according to their technical sense, unless, upon the whole will, it is plain that the testator did not so intend; and that the words "heir male" are words of art. But the whole will, and every word contained in it, as well as its application to

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the objects of it at the time when it was made, are to be taken into consideration. Does it, then, plainly appear that the testator did not mean to use the words "heir male" in the strict sense which the law prima facie ascribes to them? Richard Chilcott was dead, having left five daughters, who were his co-heirs; and their respective heirs collectively would be the heir of the stock of Richard Chilcott. Of these five daughters, the four youngest had sons, and the eldest had none, but daughters only. It is clear that the testator intended the whole inheritance to go to one person; for, the devise is, to the "first male heir"—"male *heir*," in the singular number, and "the first." But no son or other male descendant of any of Richard Chilcott's daughters could be full and complete male heir either of Richard Chilcott or his family, except upon the failure of male descendants of all Richard Chilcott's daughters but one. It is scarcely possible, therefore, to suppose that the testator could intend that no one of Richard Chilcott's family should take any thing, except in such an extraordinary event as that of the entire heirship having centered in a single male. A son or grandson of one of the daughters might be heir male of his own mother or grandmother; but he would not be complete heir of any of the other daughters who left children, whether male or female. Further, it appears from the use of the word "first," that the testator intended priority of some kind. But, among co-heirs, there is no priority by law. In this respect, therefore, some peculiar meaning must also be ascribed to the word "heir" as employed in this will. Further still, no person can be heir in the strict legal sense, whose ancestor is living—nemo est hæris viventis: and it is contended that the testator's description must be confined to a male who should have survived his mother. Now, it is found in this case that the testator well knew the state of the family at the time when he devised the remainder by the words "first heir male."

John Chilcott then had no son; and, if he should not have any (as he had not), this remainder was to come into possession upon the deaths of the testator's wife and her two sisters; an event which might reasonably be expected to happen at no great distance of time after the testator's own death. The testator not only knew that the five daughters of Richard Chilcott were living, but he speaks of them in his will, and directs legacies to be paid to such of them as should be living when the remainder should fall into possession; from which the expectation of the testator plainly appears, that the estate of the person described as "male heir" would probably come into possession during the lives of at least some of the daughters. Is it a rational intention to impute to the maker of this will (as such intention is to be collected from the terms of it), that, if all the daughters should survive the time for taking possession, the whole estate should pass from all the males of Richard Chilcott's branch of the family, and that all the daughters should lose their legacies? Yet such must be the effect of construing the word "heir" strictly according to the maxim, nemo est hæris viventis. Lord Hardwicke, in *Brown* v. *Barkham* (*a*), upon the rehearing of a decree of Lord Cowper, who had held a younger brother to be capable of taking as heir male under a devise to the heir male of the body of the testator's great grandfather, though the daughter of an elder brother was heir general, divided the case into two questions—first, whether it was an established rule that he who claims as heir male by purchase must be general heir as well as nearest male descendant—secondly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. He then says, with respect to the rule itself, that, if the doctrine had been res integra, he was so fully convinced of the unrea-

(*a*) Pr. ch. 442, 461.

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sonableness of it that he never would have established it. But, when a rule of law has long prevailed, it ought to be supported, though it be not strictly agreeable to natural reason; for, in many instances, it is more material that the law should be settled than how it is settled. He then proceeded to consider the second question; and, after stating several authorities to shew there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him; and on account of these only affirmed Lord Cowper's decree. We have, therefore, the authority of Lord Hardwicke, while assenting to the rule, admitting that it is not indispensible that the devisee should in all cases be complete heir in every sense of the word, and acting upon that admission. It has already been shewn that the manifest objects of the present will must be defeated unless a co-heir can be considered as heir. If, then, the testator has not employed the word "heir" in its full and absolute and strictly legal sense, to what extent is the construction to be enlarged? Notwithstanding the strictness with which the rule has generally prevailed, and the apparent application to it of the maxim, nemo est hæris viventis, it has been determined by the high authority of your lordships' House in more instances than one, that the word "heir" may be construed to mean "heir apparent," if the context of the will so require. Thus, in a case which arose upon the will of one Wilks, a devise in remainder "to the heirs male of the body of Robert Durdant, now living," was determined in the House of Lords, in a case of *James* v. *Richardson* (*a*), in conformity with a judgment of the King's Bench, which had been reversed in the Exchequer Chamber, to be a remainder vested in the heir apparent of Robert Durdant. And in another case which afterwards arose upon the same will—*Burchett* v. *Dur-*

The word "heir" may be construed to mean "heir apparent," if the context of the will so require.

(*a*) Sir T. Jones, 99; 1 Vent. 334; 1 Eq. Cas. Abr. 214; Sir T. Raym. 330.

dant (*a*)—the Courts of King's Bench and Exchequer Chamber held themselves bound by the previous decision of the House of Lords. Again, in *Darbison* v. *Beaumont* (*b*), a case arose upon another will containing a devise in remainder "to the heirs male of the body of Elizabeth Long, wife of R. Long, lawfully begotten." A legacy was given to Elizabeth Long, and her three sons were named in the will; by which it appeared that the testator knew that she was living and then had three sons. The Court of Exchequer, by a majority of the Judges, held that the eldest son, during the life of his mother, might sustain his claim to the remainder, being heir apparent; and, though their judgment was reversed by the two Chief Justices, in the Exchequer Chamber, it was affirmed in the House of Lords. These decisions of the highest tribunal must be esteemed binding and conclusive upon the Judges at Westminster-Hall in any case which cannot in principle be distinguished from them. It must, indeed, be admitted that several very learned persons have hesitated to acquiesce in the doctrine which they established; yet we find the doctrine recognized by Lord Chief Baron Gilbert, in his treatise on Uses and Trusts (*c*); who there says: "If an estate for life be devised to A. during the life of B., in trust for B., and, after the decease of B., to the heirs male of the body of him the said B. now living; that is a remainder vested in the heirs of B.; for, 'heir now living,' in a devise, must be taken as a periphrasis of the heir apparent, who is called heir in law, as may be observed by the words quare filium et hæredem rapuit." The language of the statute of treason (*d*) might also have been added as an instance, in which the heir apparent to the Crown is called the King's and Queen's eldest son and heir. And in the case of

(*a*) 2 Vent. 311; 3 Keb. 832; Pollex. 457.

(*b*) 1 P. Wms. 229; 3 Brown's Parl. Cas. 60.

(*c*) Page 25.

(*d*) 25 Edw. 3.

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Goodright d. *Brooking* v. *White* (*a*), which was a devise to the heirs of the testator's daughter M.W., to whom he had given a term and an annuity, and made her sole executrix and residuary legatee: the Court of Common Pleas sustained the claim of the son of M. W. during his mother's life—Lord Chief Justice De Grey saying that the testator took notice that his daughter was living, by leaving her a term and a subsequent annuity, and meant that a present interest should vest in her heir, that is, her heir apparent, during her life. I cannot suggest any distinction between these cases and the present, which militates against the adoption of a similar construction in favour of any male descendant of the daughters of Richard Chilcott who can establish his claim to be considered as heir apparent. The knowledge of the testator that all the daughters and the sons of four of those daughters, who were heirs apparent to their respective mothers, were living at the date of the will; and the directions that the devisee should pay legacies to the daughters, as already noticed, when the remainder should fall into possession, are circumstances at least as strong as those contained in any of the above cases, and exclude the supposition that all benefit both to the devisee and the legatees was to fall to the ground, unless the devisee's own mother happened to be dead.

By "first heir male," testator intended to embrace the line of the eldest daughter of Richard Chilcott.

If the word "heir" can be construed to mean "heir apparent," the next consideration will be, in what sense is the word "first" to be understood. Does it import priority of birth, priority of degree, or priority of line? As it appears that four of Richard Chilcott's daughters had sons born in the life of the testator, all well known to him, it is very improbable, that, if he meant priority of birth, he should not have named the person who then stood first according to that priority. But, when it is observed that

(*a*) 2 Sir W. Blac. 1010.

the four youngest daughters had sons already born, and the eldest had no son, the probability is very strong, that, in making use of the general expression "first heir male," he intended to embrace the line of the eldest daughter, for the purpose of giving her descendants priority in case she should have issue male.

In the transmission of real estates by descent, the law has adopted no distinction between several daughters on account of priority of birth; nor between their respective descendants on account of comparative proximity to the common ancestor; nor between the lines of the several daughters on account of priority to each other. Yet it is clear, that, of all the descendants of Richard Chilcott, one person only was to take the remainder; and that the testator meant priority of some kind. It is said in Coke Littleton (*a*)—"If lands be devised to one for life, the remainder to the next heir male of B., in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and the daughters die: some say the remainder is void of uncertainty; some say the eldest shall take, because he is the worthiest; and others say that both of them shall take, for that both make but one heir." Lord Coke expresses no opinion of his own: but, if the last be that to which he inclined, as is usually implied, his opinion would be against any distinction in favour of the son of the eldest daughter, upon a mere devise to the next male heir. But, in Hale's MSS., cited in the notes to Coke Littleton (*b*), by Mr. Hargreave, is the following note: "Harper, having a son and four daughters, viz. A., B., C., and D., devises to the son in tail, remainder to B. and C. for life, remainder proximo consanguinitatis et sanguinis of the devisor; and in Easter, 17 James, by two Justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards, Michaelmas, 20 James, per totam Cu-

(*a*) Co. Litt. 25. b. (*b*) Co. Litt. 10. b.

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riam—it vests in the eldest daughter only, and not in all the daughters—first, because proximo—secondly, because an express estate is limited to two of the daughters. *Perriman* v. *Pierce* (*a*). This case cannot, indeed, be considered as a distinct authority, that, under a mere devise to the next heir male, the son of the eldest daughter would take, to the exclusion of the others; for, although the Judges expressed an opinion in favour of the eldest daughter, yet, according to the reports of the case in Palmer, intituled of the 17th and 20th James, the question having been twice brought in judgment, the Judges did not agree in the reasons for their opinions; some of them considering the eldest daughter entitled to preference, by the terms of the devise; and others relying upon an express estate being given to the two younger sisters, which excluded them by implication from taking the estate under the devise in question. But it is an authority to this extent—that a devise to the next in blood will be confined to the eldest of several daughters, if it can be implied from the will that a preference of the eldest was in view. We must, therefore, look to the will itself, and endeavour to ascertain whether any preference is to be collected from it, regard being had both to the terms of the will and the situation of the family. The terms of the will are very peculiar. The testator was the son of the eldest of three brothers, Emanuel, John, and Richard Chilcott. John Chilcott, mentioned in the will, was the son of the testator's eldest uncle, and, by his decease, had become the representative of the next branch of the family to that of the testator. To him, or to his heir male, if any, the testator gave the lands in question after the deaths of his wife and her two sisters: and, if no male heir lawfully begotten by the said John Chilcott,

(*a*) Hale's MSS. See the case in Palmer, 11, 303; 2 Roll. Rep. 256 —nom. *Perin* v. *Pearce*; Bridg. 14; O. Bendloe, 102, 106.

then the above lands to fall to the first male heir of the branch of his uncle Richard Chilcott's family. This Richard Chilcott was the testator's second uncle; and his five daughters then living had by his death become the representatives of his branch of the family. The testator appears to have wished to give his whole estate to a male of a family of which all the stocks then existing were females. Had the stocks been males, the estate would have gone according to the priority of line. What is, then, the fair import of the devise which he has made? Is it not a devise to the heir male who shall be found to stand first in Richard Chilcott's branch of the family pedigree? A pedigree is commonly called the family tree; and a branch of it is that portion of the pedigree which arises from any particular member of it. The words, indeed, are not exactly arranged in this devise as I have supposed. They are "first male heir of the branch of my uncle Richard Chilcott's family." Such a collocation of the words, if strictly taken, gives no meaning whatever to the word "branch" distinct from the word "family;" for, even supposing the word "family" to be construed daughters, or descendants, or issue, the expression "the branch of Richard Chilcott's daughters, or descendants, or issue," would be without meaning. I think, therefore, that the words must necessarily be read "first male heir of my uncle Richard Chilcott's branch of the family." If so read, the word "family" will import the whole family or pedigree of the Chilcotts, and Richard Chilcott's branch of the family that portion of the pedigree which issues from Richard Chilcott: and the first male heir of that branch will, by a very natural construction, import the first male heir (or heir apparent) according to the priority of the lines in that pedigree. Such appears to me to be a much more natural construction than that of heir apparent first born; and more consistent with the apparent views of the person who was pursuing the branches of his

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family according to their order; and who, finding females only as the representatives of the third branch, was seeking the means of establishing a male representative or hæres factus of it. This view of the subject is much strengthened by adverting to the situation of the family when the testator made his will. The four younger daughters of Richard Chilcott had sons already born, and the son of the eldest of these four was born before any of the others. If the testator intended the first heir apparent that should be born to take, the object was before his eyes, and he had only to name him, as he named John Chilcott, the son of his deceased uncle John. But, instead of naming any of the heirs apparent of the four youngest daughters, he thinks fit to employ an expression calculated to embrace an heir apparent of the eldest daughter, who had then no son or other male descendant; and, by words of the singular number, to confine his disposition to one person. All these circumstances lead me to the conclusion that the testator intended priority of line rather than priority of birth. If, then, priority of line is intended rather than priority of birth, is this sort of priority to be continued throughout the first line, or is proximity of degree to prevail over priority of line? In the transmission of real property by heirship, all the descendants of the first line, however remote, are preferred to the nearest members of the second. If, therefore, Mary Bishop and Joan Winter had been male instead of female stocks, there is no doubt that the grandson of the former would be esteemed heir of Richard Chilcott's branch of the family, in preference to the latter: and, in a devise to the heir male of Richard Chilcott, the grandson of his eldest son, taking by purchase, though claiming through a daughter, would be esteemed heir male, being both heir and male, in preference to the son of the second son. To me it appears, that, although the testator has passed over the daughters of Richard Chil-

cott in the devise of the estate, the descendants of those daughters are intended to be treated in the same manner as if the places occupied by the daughters in the pedigree had been occupied by males. It may here be observed, that, although the law considers all the daughters as standing in æquali jure in respect of inheritance, yet that, in certain cases, where selection is required, a preference is given to the eldest co-parcener; and such privilege will descend, if it does not arise from her own act. Thus, if there be divers co-parceners of an advowson, and they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue; nay, her assignee shall have it. So, if parceners agree that partition shall be made by friends, the law gives the first choice to the eldest; but this privilege descendeth not to the issue, but the next eldest shall have it, for, there is a diversity to be observed between this case of a partition or deed by the act of the parties, for then the privilege of election shall not descend to her issue; and, when the law doth give any privilege without her act, then that privilege shall descend (*a*). If, therefore, an advowson devised to Richard Chilcott had descended to his five daughters, and the church had become void, the eldest daughter, in the absence of agreement, would have been entitled to present to the first turn, and, if she was dead, her descendants, in preference to the second daughter.

This brings me to consider whether Matthew Perratt, the grandson of Mary Bishop, the eldest daughter, at the time when the particular estates determined, viz. in 1820, answered the description contained in the will, according to the principles of construction I have endeavoured to establish. Mary Bishop, his grandmother, died in 1799, leaving Elizabeth, her eldest daughter, married in

(*a*) Co. Litt. 166. b.

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1794 to John Derham Perratt, and three other daughters. Elizabeth, in 1795, bore a son, Matthew Perratt, who, as well as his mother, Elizabeth Perratt, and her three sisters, are still living. Elizabeth Perratt, therefore, and her three sisters became, in 1799, co-heirs of their mother Mary Bishop, the eldest daughter of Richard Chilcott; and Matthew Perratt then became heir apparent of his mother, the eldest of these co-heirs. Now, if the dispositions of this will, when applied to the state of the family at the time when it was made, necessarily shew that the person designated as "the first male heir" was not intended to be complete and entire heir, but might sufficiently answer the description of heir of one of the several co-heirs of Richard Chilcott, I cannot see any distinction in principle between a person who is heir to one co-heir who represents a fifth, and one who represents a portion only of a fifth. In the present case, Winter is heir apparent to the daughter of the second line, who represents one fifth of the stock of Richard Chilcott, and Matthew Perratt is heir apparent to the granddaughter of the first line, who represents one fourth of one fifth of Richard Chilcott's stock. But Matthew Perratt, as heir apparent and a male of the first line, stands first, according to my view of the subject, in Richard Chilcott's branch of the family pedigree; and is, consequently, the person answering the description pointed out by the testator. This character was perfectly in him when his grandmother died in 1799. From 1795, when he was born, till 1799, he was only heir presumptive, because his grandmother, in contemplation of law, might have had a son: but, in 1799, his character of heir apparent was complete: and then, I think, but not till then, the remainder first vested in interest. Till that time it appears to me that the remainder was contingent. No person before that time could be said to fill the entire character of first male heir in the sense which I have ascribed to it. So long as the first line remained without a

Matthew Perratt first in Richard Chilcott's branch of the family pedigree.

male heir apparent, the title of every other male of the family to the character of first male heir was depending on contingency; and, as the person described was to take in fee, the remainder could not vest in any one during the uncertainty as to the person to whom the devise would apply (*a*). These considerations induce me to answer the several questions proposed by your lordships as follows:—

1. I am of opinion that the remainder to the first male heir of the branch of the family of the testator's uncle Richard Chilcott, is a remainder in fee,

1. The remainder is a remainder in fee.

2. I am of opinion that the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living.

2. "First male heir" one of whom an ancestor might be living.

3. I am of opinion that this remainder vested in interest in 1799, when Mary Bishop died.

3. Remainder vested on the death of M. Bishop.

4. I am of opinion that this remainder first vested in interest in Matthew Perratt.

4. It first vested in M. Perratt.

5. I am of opinion that the remainder, if once vested, could not open or become divested, so as to admit another person in preference to the person in whom it had vested.

5. If once vested, it could not afterwards become divested.

Mr. Justice LITTLEDALE merely referred to the opinion delivered by him in the Court below (*b*) viz. that Thomas Viney, the son of Betty, the fourth daughter of Richard Chilcott, who was born on the 5th of March, 1765, and whose mother died on the 24th of February, 1804, answered the description of "first male heir" of the branch of the family of Richard Chilcott, the testator's uncle; and that the expression "first male heir" was *not* used by the testator to denote a person of whom an ancestor might be living.

Mr. Baron BAYLEY.—In answer to the first question proposed by your lordships for the consideration of his

First question. —The remainder is a remainder in fee simple.

(*a*) Fearne's Cont. Rem. c. 1, s. 8. (*b*) See 5 Barn. & Cress. 56 et seq.

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Majesty's Judges, my opinion is that the remainder mentioned in that question is a remainder *in fee simple*. In the limitation to John or his heir male, the prohibition against selling or mortgaging, but that the property should remain in the Chilcott's family *for lands of inheritance*, intimates plainly that he meant afterwards to dispose of what should be an *inheritable estate;* and, though there are no words of limitation engrafted upon the devise to the first male heir of the branch of Richard Chilcott's family, yet the charge upon that person to pay 100*l.* to each of the daughters of Richard Chilcott then living, would have the same effect, *i. e.* to make the estate he took an inheritable estate. Still the question would remain, whether this inheritable estate was to be in fee or in tail; for, though a charge upon a devisee will turn into an estate in fee what would otherwise have been an estate for life only, it will not have that effect upon what would otherwise have been an estate tail. Is there any thing then upon this will to confine the devise to the first male heir of the branch of Richard Chilcott's family to an estate tail? It is not a devise to the *heirs male*, in the plural, which might have comprehended at least the *male issue* of the first taker, if not his collaterals when they should become heirs male of the body of Richard Chilcott: but it is to the *first male heir*, as if he meant to limit to an individual, and to an individual only. A devise to the heirs male of Richard Chilcott's branch, in the plural, would, or at least might, have vested in each daughter's eldest son, if not in Matthew Perratt also, and would have been transmissible to their male lineal descendants; and that this was not the intention appears clear to me from the use of the words "first male heir," without any words of limitation superadded thereon.

Effect of a charge upon a devisee.

In answer to the second question proposed by your lordships, my humble opinion is, that the expression "first male heir," was used by the testator to denote a

Second question.—"First heir male" used to denote one

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of whom an ancestor might be living.

person of whom an ancestor might be living. I am aware that, upon this point, I differed in the Court below from those for whose profound legal knowledge I entertained the highest respect; but I did not presume to differ without great consideration: and, upon thinking again and again upon the point, I cannot bring myself to change my opinion. That the word "heir" in a will *may* mean "heir *apparent*," though the person be not *complete* heir, but his ancestor through whom he claims as heir is still alive, is clear from *James* v. *Richardson*, *Burchett* v. *Durdant*, *Long* v. *Beaumont*, *Brown* v. *Barkham* (or *Newcomen* v. *Backham*), and *Goodright* v. *White*; and the material question is, whether that is its meaning in this will. At the time this will was made, there was no one who would answer the description of heir male of Richard Chilcott's branch, if *complete* heir male were meant; and the testator knew it. There were four who answered the description of such heir male if heir *apparent* were meant; and there was a possibility that a fifth heir apparent might come in esse, who would supersede the other four. Why should the testator mean *complete* heir? why should he not mean heir apparent? Upon the former supposition, the estate would never vest, if all the five daughters of Richard Chilcott were in esse at the time the particular estate failed; and, if one and one only were then dead, though her son, if any, might take, it would be matter of chance, depending upon the mother's death, which daughter's male descendant would take: whereas, upon the latter supposition, that *heir apparent* was meant, some of the daughters' male descendants would certainly take (unless the limitation to them is void upon some other ground), and they would, as it seems to me, have taken according to a known course of succession, *i. e.* the seniority of the daughters under whom they respectively claimed. Had it appeared *by the will* that the testator knew the different

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members were living, *James* v. *Richardson*, *Burchett* v. *Durdant*, and *Long* v. *Beaumont*, would have been in point that heir apparent was meant; and it does appear by the will that some at least were living, by the proviso for paying such of the daughters of Richard Chilcott as should *then* be living, when this limitation was to take effect in possession, 100*l.* each. I cannot, therefore, bring my mind to doubt but that, by first male heir, the testator meant first male heir *apparent*; and that by those words he intended—first, the son, if any, of Mary—secondly, the son, if any, of Joan—thirdly, the son, if any, of Sarah—fourthly, the son, if any, of Betsy—and fifthly, the son, if any, of Agnes; and that he might mean that a son of a son should stand in his father's place, but that a grandson by a female should only stand in his mother's place, and should not be preferred to a grandson by a male.

Third question.—The remainder vested in interest upon the death of Mary, the eldest daughter, in 1799.

As to the third question, my answer to your lordships is, that this remainder vested in interest upon the death of Mary the eldest daughter, in 1799, I take it to be one rule as to the vesting of remainders, that, if there be a contingent remainder in fee simple absolute, without condition or qualification, any remainder expectant thereon, to take effect or fail according as that fails or takes effect, is a *contingent* remainder only. This I consider settled by *Luddington* v. *Kime* (*a*). The limitation, therefore, to the first male heir, &c., which as it seems to me would have vested in a son of Mary in fee, would, as it seems to me, prevent any subsequent remainder from vesting so long as there was a legal possibility of there being such son: and I take it the law would consider such possibility as continuing so long as Mary lived. I am therefore of opinion that this remainder could not vest before 1799, when Mary died. But I take it to be another rule as to the vesting of remainders, that they are to be considered as vesting as soon as by law they may, and that, where they

(*a*) 1 Lord Raym. 203.

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are subject to no other contingency but that of taking effect in possession, and where the remainder-man's right to take in possession cannot be defeated by third persons or events if he live till the particular estates determine, they are vested remainders. When, therefore, Mary died, inasmuch as the right became absolute and indefeasible, either in Matthew Perratt, if he is to be deemed first male heir, or in Thomas Chilcott Winter, if that character belongs to him, because then either the one or the other of those persons became heir apparent instead of heir presumptive, and no subsequent event could defeat his right to the possession if he lived till the particular estate ended, it seems to me the remainder vested.

Fourth question.—The remainder first vested in interest in Thomas Chilcott Winter, and, upon his death, passed by descent to his brother Isaac.

This brings me to the fourth question—in what person did this remainder first vest in interest. My humble opinion is that it first vested in Thomas Chilcott Winter, and upon his death passed by descent to his brother Isaac. The competition lies, as it seems to me, between him and Matthew Perratt; and my preference to Winter is, because he is propinquior gradu, and because Perratt, in point of representation, stands in the place of his *mother* only, and therefore is less worthy than Winter. I do not say that the son of a daughter may not under circumstances claim as heir male of his grandfather, or the daughter of a son as heir female. I do not say that Perratt is not heir male of his grandmother, or that he might not be one of the co-heirs of his great grandfather, Richard Chilcott. But I think he is not *first male heir* within the meaning of this devise. This is a very peculiar case. The eldest daughter's line is resorted to, not because the children in that line are more the male heirs of Richard Chilcott than the sons of any of the other daughters, but because inter pares the eldest daughter's is the proper line, and it prevents confusion to refer to it. But, when there is a disparity in the claimants under the different lines, and the person who claims in the eldest

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daughter's line is more remote, and therefore less worthy than the person who claims in the second daughter's line, I see no satisfactory reason for adhering to the elder daughter's line; I think I do see a satisfactory reason for departing from it. One of the grounds upon which our law adopts in infinitum lineal descendants in preference to collaterals, is, that the descendant represents the ancestor, that is, stands in the same place as the ancestor, if living, would have done. This is Blackstone's first rule or course of descent. And what is the fair meaning of this rule, as applied to this case? Is it to raise Perratt into his mother's place, and allow him to reckon as a grandson of Richard Chilcott? or is it not rather if he is to be raised into his mother's place, to identity him with his mother, and, upon the principle of representation, to treat him as a female rather than a male. To treat him as a male, it seems to me he is to be considered as a great grandson, and then I should say he has not so good a claim to the character of "first male heir" as a grandson by the eldest daughter. Let it be remembered also, that Mary, the eldest daughter, had four daughters; so that, if a son of one of them would have answered the description of "first male heir," the remainder never could have vested till the particular estate ended, unless the eldest had a son, and unless that son survived his grandmother: and, though this would be no argument if it were clear who is to be considered as coming under the description of "first male heir," it may have some weight where this not clear, and where we are deciding upon the rule by which this is to be ascertained. If, for instance, the three younger daughters of Mary had married, and had had sons, and the elder had continued single till E. White died, this remainder would have continued contingent till the death of E. White; because the elder daughter might still have married and have had a son, and any son by her born (or in ventre sa mere) before E.

White died, would, if that be the right construction, have been the first male heir of Richard Chilcott's branch. These considerations lead me to the conclusion that Thomas Chilcott Winter is the person who answered the description of first male heir, not Matthew Perratt; and that, from Thomas Chilcott Winter, the right descended upon his brother Isaac.

In answer to your lordship's last question, my humble opinion is, that this remainder, if it once vested an interest in any person, could not open or become divested so as to admit any other person in preference to the person in whom it had so vested.

Fifth question.—The remainder, if once vested, could not divest.

Lord Chief Justice TINDAL.—Upon the first question proposed by your lordships, the opinion which I have formed, after the argument at your lordships' bar, is this, that the remainder to the first male heir of the branch of the family of the testator's uncle, Richard Chilcott, is a remainder in fee simple. The words "first male heir, &c." appear to me to be only a designatio personæ, and not words that chalk out the line of descent to be to the heirs male; and, if only words of purchase, then the person who takes under that description would have an estate for life only, were it not for the words of charge which follow; which words, operating as a charge not upon the estate, but upon the person of the first taker, will, as it appears to me, have the effect of enlarging the indefinite devise to the first male heir into an estate in fee.

First question. The remainder, to the "first male heir," is a remainder in fee simple, by reason of the subsequent words of charge.

Upon the second question, I think the expression "first male heir" was used by the testator, not in the sense of complete heir, that is, to denote a person whose ancestor must then be dead, but in a more special and limited sense, as an heir apparent of a person then living. The condition upon which the devise is made, is, that such "first male heir of the branch of my uncle Richard Chilcott's family," shall pay a certain sum "unto such of the daugh-

Second question.—"First male heir" used to denote an heir-apparent of a person then living.

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ters of the said Richard Chilcott as should be then living." But, at the time of making the will, Richard Chilcott, the uncle, was dead, leaving five daughters him surviving; and the heir male of Richard Chilcott must of necessity claim through one of those daughters, though it is uncertain which of them it might be. And, as the special verdict finds that the testator knew the condition of his family, and, as the words of the charge are large enough to shew, as it appears to me, that the testator contemplated the possibility of all of such daughters being alive when the limitation to the male heir was to vest in possession; I think he shews his meaning to be, that, by "male heir," he intended an heir apparent; and the circumstance that it appears upon the will itself that the testator contemplated the possibility that the mother might be alive when her son might take as heir of the uncle, brings the case within the principle established by the case of *Darbison* v. *Beaumont*, and the other cases relied on by the counsel for the lessor of the plaintiff in his argument at your lordships' bar.

Third question. —The remainder vested in interest as soon as there was any person in existence answering to the descriptio personæ contained in the will;

Upon the third question proposed, I think the remainder vested in interest as soon as there was any person in existence answering to the descriptio personæ contained in the will, of "first male heir of the branch of my uncle Richard Chilcott's family:" and therefore capable of taking under that description; for, I take it to be a general rule with respect to the vesting of contingent remainders, that they must vest at the earliest possible moment at which they are capable of vesting. And, in the present case, as it appears to me, that, if Mary the eldest daughter had had a son, and had died leaving such son her surviving, such son would without any doubt or uncertainty have answered the description of first male heir of the branch of the family; and as, in contemplation of law, such son might be born at any time during her life; so this remainder could not possibly vest in interest under

and such remainder could not vest before

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the events which have happened in this case, earlier than the death of Mary; but that, upon the death of Mary, such remainder must either vest or be entirely defeated, there being then no contingency for which it need wait. Whether, however, it then vested or was defeated, would depend upon this, whether there was at that moment any person in existence answering the description contained in the will; the discussion of which point belongs properly to the fourth question proposed by your lordships.

the death of Mary, the eldest daughter of Richard Chilcott.

Upon the fourth question, which, as it appears to me, is at once the most important and the most difficult to be answered, I believe I have the misfortune to have arrived at a different conclusion from that of any of my learned brothers; for, after giving every consideration in my power to the arguments which have been urged in support of the several claims of the respective claimants, I cannot form an opinion as to the priority of the claim of either with that degree of satisfaction to my own mind that will justify me in offering it to your lordships; and the consequence, in my humble judgment, is, that the devise is void for uncertainty, and the estate descends to the heir-at-law. The question is, whether, by "first male heir," the testator intended the first male descendant of the eldest daughter, that is, whether the priority which he contemplated relates to *the eldest line of descent;* in which case the estate would fall to Matthew Perratt, the grandson of the eldest daughter; or whether, by "first male heir," he intended such son of any of the daughters as should be born first in point of time—that is, whether the priority he contemplated is to be referred to priority of degree and time of birth only; in which case the estate would go to Isaac Winter, who represents his brother, the first born son of any of the daughters or, lastly, whether, by "first male heir," he intended such male descendant of any of the daughters as, by the death of his ancestor, should first fill the character of *complete heir;* in which case the estate

Fourth question.—The devise is void for uncertainty, and consequently the estate descends to the heir-at-law.

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would fall to Thomas Viney, the grandson of Betty, he being the first in point of time, who, by the death of his father in 1819, became complete heir to his grandmother. Upon the argument of this case in the Court of King's Bench, two of the learned Judges declared their opinion in favour of Thomas Viney's claim; the other learned Judge declared his opinion in favour of Isaac Winter. On the present occasion, your lordships have heard the judgments of two of my learned Brethren in favour of the claim of Matthew Perratt, of one in favour of that of Isaac Winter, and one in favour of that of Thomas Viney. Each of these opinions is fortified with arguments so strong in support of each particular view which has been taken of this devise, that not merely the plainest understanding, but the most acute mind, and such as is the least given to doubt, may well declare its own inability to decide to which the preference is to be given. I must profess myself unable to satisfy my mind, both upon the reading of the will and the balancing of the arguments employed by my learned Brethren, which is the more just construction of the will, that is, which is the devisee intended by the testator. It appears, therefore, to me, that the present case is precisely one in which the heir-at-law has the right to say that the devisor has not declared his intention with such certainty as to take away his prior right by descent, according to the doctrine laid down by Lord Chief Justice Hobart in *Counden* and *Clarke's* case (*a*).

Fifth question.—The remainder, if once vested in interest, could not afterwards become divested.

As to the fifth and last question, I am of opinion that the remainder, if it once vested in interest, cannot open or become divested so as to admit another person in preference to or in substitution of the person in whom it once vested.

In my humble opinion, therefore, the judgment of the Court below ought to have been given for the defendant.

(*a*) Hobart, 33.

LUCAS, Esq., THOMPSON, Esq., DAVIS, BULL, LINGHAM, and EICKE, *v.* NOCKELLS. 1833.

THIS was an action of trespass brought against the plaintiffs in error for breaking and entering the ship of the defendant in error, and seizing and taking certain goods and merchandize then being therein. The first count of the declaration stated that the defendants below, on the 1st January, 1823, with force and arms &c., broke and entered a certain ship of the plaintiff below, of the value of 6,000*l.*, then lying in the London Docks, and made a great noise and disturbance in and on board the said ship, and stayed and continued therein, making such noise and disturbance, for a long space of time, to wit, for the space of two days then next following, and put and placed in and on board the said ship divers tackles and ropes, and fixed the same to the said ship, and broke open the hatchways, and greatly injured, damaged, and spoiled the said ship, and greatly injured the hold thereof, and seized and took divers goods and merchandize, to wit, three hundred casks of oil, one hundred bales of wool, twenty bundles of whalebone, two casks of seal skins, five casks of hides, &c., of great value, to wit, of the value of 10,000*l.*, then in the possession of the plaintiff below, in and on board the said ship, and on which said goods and merchandize the plaintiff below had a lien to the amount of 6,000*l.* for certain freight due to him as owner of the said ship, and carried away the said goods and merchandize, and converted and disposed thereof to their own use: by means whereof, the plaintiff below was deprived of his lien, and the freight had become and was wholly lost to him. The second count was for seizing and taking possession of a certain other ship or vessel of the plaintiff below, and seizing his goods (describing them as in the first count), and carrying away the same, and converting and disposing thereof to the use of the defendants below. The third

The virtute cujus may be traversed where it involves matter of fact; but not where it involves a mere matter of law.

In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of fi. fa. sued out on a judgment obtained against the consignor of the goods. The plaintiff replied de injuria sua propria absque residuo causa, and new assigned that the defendant entered the ship and took the goods for other purposes than those mentioned in the plea.—*Held*, that, on these pleadings, it was competent for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, and under another claim; and that the writ and proceedings under

it were a mere colour and contrivance to get possession of the goods.—Mr. Justice J. Parke dissentiente.

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count was for seizing, taking, and carrying away the goods of the plaintiff below, then found and being in his ship or vessel, and converting and disposing of the same to the use of the defendants below.

To this declaration, the defendants Lucas and Thompson pleaded (jointly)—first, the general issue—secondly, that, at and before the time of the supposed trespasses, they were sheriff of Middlesex, that certain persons called R. Hopley, G. A. Lingham, and T. Lingham, had recovered, by judgment of the Court of King's Bench, against one N. Thornton, a debt of 20,000*l.*, and 84*s.* costs; that thereupon they, the said R. Hopley, G. A. Lingham, and T. Lingham, had sued out a writ of testatum fieri facias against Thornton, directed to the sheriff of Middlesex, returnable on &c., and indorsed to levy 20,000*l.*, besides &c.; that the said writ being delivered to them the said Lucas and Thompson, as such sheriff, to be executed, by virtue thereof, and of a warrant duly made by them to two of their officers, Davis and Bull (two other of the defendants), the said Davis and Bull, before the return of the writ, entered the said ship, and took in execution the goods and merchandize mentioned in the declaration, being the goods and merchandize of the said N. Thornton, and liable to be taken in execution by virtue of the said writ. The plea then justified in the usual manner the breaking open of the hatchways to get at the goods, and fixing tackle to the ship for the purpose of removing them. The other defendants severally pleaded the general issue: the defendants Davis and Bull also severally justified as sheriff's officers acting under the writ and warrant; Lingham also justified as one of the plaintiffs in the suit against Thornton, and as an assistant to the officers; and Eicke, in like manner, as an assistant to Davis and Bull.

Issues were joined on the several pleas of the general issue; and, to the other pleas, after protesting the judg-

ment and writ in those pleas mentioned, the plaintiff below replied that the defendants below, of their own wrong, and without the residue of the cause by them in their last pleas alleged, committed the said several trespasses in the introductory part of those pleas mentioned. The plaintiff below also newly assigned, that the defendants below, at other times, and on other occasions, and for other purposes than those mentioned in the pleas, and with excessive and unnecessary force and violence, broke and entered the said ship, and seized, took, and carried away the said goods.

The defendants below joined issue on the replications, and pleaded (Lucas and Thompson jointly, the rest of the defendants severally) not guilty to the new assignment: whereupon issues were joined.

At the trial before Lord Tenterden, at the Sittings at Guildhall after Trinity Term, 1826, the following facts were given in evidence:—The plaintiff below was the sole owner of the ship Emerald, the vessel in the declaration mentioned, on board of which the goods were seized. On the 8th August, 1822, a charterparty (reciting a former subsisting charterparty between the same parties) was duly executed at Port Jackson, New South Wales, by which the Emerald was chartered to N. Thornton for a certain term; Thornton covenanting to pay a certain stipulated freight within ten days after the delivery of the cargo to him or his assigns. On the 2nd December, 1822, a cargo, consisting of oil, wool, whalebone, skins and hides (the goods in the declaration mentioned), was shipped by Thornton, under this charterparty, on board the Emerald, at Van Dieman's Land, for London; and Elliott, the master, signed a bill of lading, in which the cargo was described as having been shipped by Thornton to be delivered at the port of London to Messrs. Hopley & Linghams, or to their assigns, he or they paying

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freight for the goods as per charter, with primage and average accustomed. On the 27th June, 1823, the ship, with her cargo, arrived in safety in the river Thames; and, while she was near Gravesend, in the course of her voyage for London, viz. on that day, G. A. Lingham went on board, inquired about the state and quality of the cargo, and received letters from Thornton addressed to the firm of Hopley & Linghams. On the 30th June, G. A. Lingham went to the counting-house of the plaintiff below in London, and said he wanted the ship to go to Brewer's Quay, but the plaintiff below insisted that she should go into the London Docks; when Lingham produced one part of the bill of lading, and said that he wished to look at the ship's manifest; and, on its being produced, it appeared that the goods were consigned to Messrs. Hopley & Linghams; on which the plaintiff below consented that the ship should go to Brewer's Quay to discharge, if Hopley & Linghams would pay freight for the goods according to the first charterparty; but he afterwards said, that, if they would agree to pay the freight at the lower rate mentioned in the second charterparty, he would consent to take the freight at such lower rate; to which proposition Lingham made no answer. After the ship had been reported at the Custom House, viz. on the 1st July, the plaintiff below informed Hopley that she had been so reported, and offered to deliver the cargo where he, Hopley, and his partners, the Linghams, pleased, if they would agree to pay the freight; but Hopley said he would give no promise. Some altercation then took place between the plaintiff below and Hopley, when the latter said—"I will make something of you before I have done with you." On the 2nd July, 1823, the writ of testatum fieri facias mentioned in the pleas was sued out by Eicke (one of the defendants below) as the attorney for Hopley & Linghams, to whom Thornton was considerably in

debt; and the writ was delivered, on the day it was issued, to Lucas and Thompson, as sheriff of Middlesex, who thereupon granted their warrant, directed to Davis and Bull, as bailiffs of the sheriff, to levy on the goods of Thornton. On the 3rd July, Davis and Bull went on board the ship, and left a copy of the warrant with Elliott, the master, who gave it to the plaintiff below. The hatches were then open; but the plaintiff below desired the master to lock them down until further orders; and, when told by the master that he thought he was wrong in detaining the cargo, as the freight was not due until ten days after the delivery, the plaintiff below said "he would be damned if he cared," and ordered the master not to suffer the cargo to be taken out of the ship, or allow the use of the tackle to discharge her. On the following day, viz. the 4th July, four of the defendants below—Davis, Bull, G. A. Lingham, and Eicke—again went on board the ship, when Davis produced the warrant under the writ in the pleas mentioned to the plaintiff below, and Eicke gave directions as to unloading the cargo. The plaintiff below protested against these proceedings, and required the defendants below to leave the ship; notwithstanding which they broke open the hatches, which had been closed according to the directions of the plaintiff below, and began to unload the cargo, and continued to do so until the 17th July, by which day the whole of it was taken out. The produce of the sale of the goods was stated to have been 1,950*l.*

On the 4th July Messrs. Hopley & Linghams presented a memorial to the commissioners of the Customs, as follows:—

"Honorable Sirs,—We have on board the ship Emerald, captain W. Elliott, from New South Wales, two hundred and sixty casks of train oil, which we have paid duty on, and are desirous of landing at the legal quays.

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The vessel is appointed for the London Docks, but, having no compellable goods on board, we hope your Honors will be pleased to direct officers to be appointed to the legal quays also."

On the same day, Elliott, the master, made two separate affidavits, that the cargo of oil and whalebone was British property; and, to the papers on which these affidavits were written were annexed two others by T. Lingham, who, for self and co-importers, deposed to the best of his knowledge and belief that the cargo was British property.

No auction duty being payable on the first sale by the importer of the oil, Hopley & Linghams, on the 7th August, annexed to a catalogue for sale by public auction of (among other things) the oil, part of the cargo, the following certificate:—

"This is to certify that the undermentioned lots included in Messrs. Aylwyn & Co's public sale this day at Garraway's Coffee House, have been imported within twelve months from this date, and have not been previously sold or parted with; and that this is the first sale thereof."

Hopley & Linghams also, on the 7th August, addressed a note to the auctioneer, as follows:—

"Mr. John Aylwyn,—We appoint you to buy for our account this day, at Messrs. Aylwyn and Co's public sale, the following goods, at the prices annexed, being our property. [Subjoined was a description of the oils sent by the Emerald, with the prices to be given for them.]"

These two latter instruments were left by Hopley & Linghams at the Excise Office, and the goods were put up to auction under their direction on the 7th August, the sheriff being indemnified by Hopley & Linghams in respect of any thing done under the writ and warrant.

Lord Tenterden told the jury (inter alia) that the question for their consideration was, whether the goods were really and bona fide taken by virtue of the writ of execution—for that, if they were, the verdict ought to be for the defendants below; or, whether the execution was had recourse to merely as a colour to enable the defendant Lingham and his partners, who were the consignees, to take the goods, and to get possession of them and land them as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading—in which latter case the verdict ought to be for the plaintiff below.

This direction was excepted to, on the grounds (among others), that the question proposed by his Lordship for the consideration of the jury, was not open for their consideration upon the pleadings in the cause; that none of the counts of the declaration were proved; and that the Lord Chief Justice ought to have directed the jury, upon the evidence, that the possession of the ship was not, at the time of the entering of the same by the defendants below, by law vested in the plaintiff below, and that the plaintiff below had no lien on the goods, and consequently that the plaintiff below was not competent to maintain the action. The jury returned a verdict for the plaintiff below, damages 1,950*l.*; and a bill of exceptions was tendered and sealed by his Lordship.

The exceptions came on for argument in the Exchequer Chamber in Easter Term, 9 Geo. 4, when the judgment for the plaintiff in the Court below was affirmed (*a*). The defendants below sued out a writ of error, assigning for errors—First, that the defendants below did no act which they were not authorized by law to do; and that it would be dangerous to allow the motives or reasons of parties to be called in question upon speculative grounds, where the

(*a*) See 1 Moore & Payne, 783; 4 Bing. 729.

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acts done by them are authorized by law.—Secondly, that the question submitted to the jury did not arise on the pleadings, and was not supported on the evidence.—Thirdly, that the fact that the plaintiff below had no lien on the cargo, was a material point to guide the jury in their verdict, especially as to the amount of the damages; and that this fact was not submitted to their consideration. —Fourthly, that there was no ground upon which the verdict ought to have been given on the new assignment. —Fifthly, that the sheriff and his bailiffs, as public officers, could not have acted otherwise than they did; and that, as against them, the verdict was not sustainable on the ground presented to the jury.

The following question was submitted by the House of Lords for the opinion of the Judges:—

"An action of trespass being brought against a sheriff and another person for entering the plaintiff's house and seizing and taking away his goods on divers days and times, the sheriff pleaded a justification under a writ of fieri facias issued against the goods of A. B. at the suit of the other defendant, averring that goods of A. B. were in the house, and that he entered the house to seize, and did seize and sell them under the writ: the other defendant pleaded the same plea, with the addition of the judgment recovered by himself against A. B. The plaintiff replied, admitting the judgment and writ, and traversing the residue of the cause; and also added a new assignment, at other times, on other occasions, and for other purposes; and also alleging excess. At the trial, it appeared that the sheriff had made a warrant to his officers, who entered the house and continued therein until all the goods were removed, which occupied three or four days; and that the sheriff was indemnified by the other defendant—Was it competent by law, on these pleadings, for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in

execution of the writ; but for another purpose, under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods?"

After having heard the arguments at the bar of the House, five of the Judges delivered their opinions, as follow:—

Mr. Justice BOSANQUET.—In this case it appears to me that the new assignment may be laid out of consideration. The question upon which my opinion turns is this, whether the evidence in the case supposed by your lordships relates to a material allegation contained in the plea and denied by the replication. The effect of the replication is to put in issue every material fact, except the judgment and writ of fieri facias, which constitutes any part of the cause for which the defendant alleges that he committed the acts professed to be justified. Whatever fact the plaintiff might consistently with the rules of law have traversed separately, he denies by the general form of replication which he is allowed to employ in such a case as this. It may be assumed that, in the action shortly described in your lordships' question, the declaration would state that the defendant broke and entered the plaintiff's house, seized, took, and carried away his goods, and converted and disposed of them to his own use; and that the plea would profess to justify the entry of the house, and the seizing, taking, and carrying away, and converting and disposing of the goods to the defendant's use; and for that purpose would allege that goods liable to be taken in execution under and by virtue of the writ and warrant to the bailiff, were in the house; that, under and by virtue of the writ and warrant, the bailiff entered the house in order to seize and take, and did seize and take the goods in execution, and afterwards, and before the return of the writ, sold the

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goods, and by sale thereof made and levied a sum of money in satisfaction of the debt and damages. Such is in fact the form of the pleadings in the case which was argued at your lordships' bar. The plea, therefore, would profess to allege by way of an excuse for the entry, seizure, and conversion of the goods, that they were taken in execution, and a levy made thereof in satisfaction of a debt. If this allegation contain matter of fact, it is traversable; if it be merely a consequence of law, it is not traversable: and, whether the evidence mentioned in the question ought to be submitted to the jury, must depend, as it appears to me, upon this point, viz. whether the allegation is to be viewed in the one light or the other. Whether the writ authorized the defendants to do any particular act alleged to have been done, is matter of law, and cannot be traversed; but, whether the defendants actually did any particular act which they allege to have been done, is a matter of fact, and may be denied. It has been truly said, that, if it be alleged that a particular act was done *by virtue* of a certain writ, the doing of such act by virtue of the writ is not traversable, because it is an inference of law; but, if it be material to shew whether the act itself was done or not, it will not be the less traversable because it is alleged to have been done by virtue of a certain writ. It would not be competent to the plaintiff to insist, under the general denial contained in his replication, or under any more special traverse, that the writ in question did not authorize the bailiffs to take in execution the goods of the debtor, and to seize and sell them in satisfaction of the debt, as they have alleged: but whether they did really take the goods in execution and deal with them as alleged in the plea, or seized them for purposes foreign to the execution, and disposed of them in some manner other than by way of sale in satisfaction of the debt, was, as it appears to me, a matter of fact put in issue by the replication,

and to which the evidence in question was applicable. In the case of *Beale* v. *Simpson* (*a*), Mr Justice Powell said he confessed that generally the virtue of a writ is matter of inference of law only, and then not traversable; but matter of fact may depend upon it, and then it is traversable; as, in that case, the taking out of prison; and for that reason it was there traversable: and Mr. Justice Nevill and Mr. Justice Blencow agreed with Mr. Justice Powell, that generally a virtute cujus is not to be traversed, containing matter of law; but, when it is mixed with fact, then it may be traversed. And though Lord Chief Justice Treby held that virtute cujus was not traversable in any case, it was given for the plaintiff, according to the opinion of the majority of the Court.

The principal authorities relied on by the defendants, and supposed to bear most directly upon the subject, are *Groenvelt* v. *Burwell* (*b*) and *Crowther* v. *Ramsbottom* (*c*): but neither of these cases appears to me to govern the present, notwithstanding the resemblance to it which they bear in several circumstances. In the case of *Groenvelt* v. *Burwell*, the plaintiff having complained of an assault and false imprisonment, which the defendants justified under a judgment of the College of Physicians, and a warrant issued thereon, the plaintiff, after protesting as to certain allegations in the plea, replied that the defendants of their own wrong assaulted and imprisoned him as before alleged, *and not by virtue of the warrant supposed in the plea.* Upon demurrer, Lord Holt declared the opinion of the Court, that the replication was bad as well in matter as in form. He says—"The defendants say that there was such a warrant, and that by virtue thereof the plaintiff was arrested and imprisoned; to which the plaintiff does not make answer that there was not such a warrant,

(*a*) 1 Lord Raym. 410. (*b*) 1 Lord Raym. 454.
(*c*) 7 Term Rep. 654.

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nor traverses it, but only says that he was not arrested *by virtue of it*. If he had denied that there was such a warrant, it had been a good traverse; for, the officer would not have been authorized to arrest the plaintiff." And he further says: "If the officer had *a good warrant at the time of the arrest*, though he had declared that he had arrested upon a warrant that was insufficient, yet, in an action brought against the officer, he might have justified under the good warrant, having had it in his custody at the time of the arrest." And he compared the case to that of a man who distrains for one thing and avows for another; which undoubtedly he may do; and he held the traverse ill. It is evident that the objection here made to the traverse is, that, as the warrant, the arrest, and the imprisonment were admitted, the traverse that the arrest and imprisonment were made *by virtue* of the warrant was not allowable. Neither the validity nor the effect of the warrant could be disputed under such a traverse: "traversat (says the special demurrer) virtutem warranti, quæ non est traversabilis, existens validitas et materia legis:" and, if the defendants only did that which they alleged in their plea that they had done by virtue of the warrant, the denial that the defendants committed the assault and imprisonment by virtue of the warrant, amounted to no more than saying, that, although the defendants were in possession of a warrant, the sufficiency of which to justify those acts the plaintiff was not in a condition to dispute as a matter of law, the defendants at the time of the act done had assigned a different reason for their conduct. Inasmuch, therefore, as this circumstance would afford no answer to the defendants' justification, the traverse founded upon it was not material. Such also appears to have been the point professedly decided in the case of *Crowther* v. *Ramsbottom*. The action was brought for seizing and taking cattle, and the defendant justified under a justicies out of the Chancery of the county palatine of Lancaster, and a

precept from the sheriff, commanding the defendant to attach the plaintiff by his goods, to compel his appearance; and alleged that the cattle were taken for that purpose, and that, the plaintiff having appeared, the cattle were redelivered. The plaintiff, admitting the writ, replied de injuria sua propria absque residuo causæ, as in the present case. At the trial, evidence was adduced to shew that the object in *executing the writ* was, not to compel an appearance, but to enforce payment of a debt and the costs; and the Judge left it to the jury to say whether the defendants entered for the mere purpose of compelling an appearance, or for the purpose of compelling the plaintiff to pay the debt and costs. Lord Kenyon, in delivering his opinion on a motion for a new trial, said: "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service. Now, here it appears that the defendants were justified under the process of the Chancery Court in entering on the plaintiff and taking his goods in order to compel appearance; and therefore the question ought not to have been left to the jury to say whether they entered for that or some other cause." As to the excess, he said—"That is a subject for an action on the case." Mr. Justice Lawrence quoted *Dr. Groenvelt's* case as directly in point.

It may be admitted that the object and motive with which the process of the law is put in execution are not the subjects of traverse, nor consequently of evidence under the replication de injuria sua propria absque tali causa. And to this extent, and to this only, do the cases cited appear to me necessarily to go. It frequently happens that the real object of arresting a defendant upon mesne process is, not to compel an appearance to an action, but to procure immediate payment of a debt by the pressure of

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an arrest; but, if nothing more be done than is required by the exigency of the writ, the act will be justified, whatever be the motive of the party, or the cause which leads him to employ the process of the law. In the case put by your lordships, the evidence points, not merely to the object and purpose of doing particular acts, but to the nature of the acts done, in order to ascertain whether they correspond with the description of them in the plea, which alleges not merely a taking by virtue of the writ of execution, but a sale and levy in satisfaction of a debt. The case, as it appears to me, stands thus:—The defendant, by way of excuse, alleges that he has done various acts, all of which, if done, would be authorized by the writ, and which, if taken jointly, would afford a good defence to the plaintiff's whole complaint; but, taken partially, would not. The plaintiff, admitting the writ, denies the rest of the cause, and offers evidence to shew that part of the defendant's acts were quite of a different character from those described in the plea. By this evidence, the effect of the writ is not impeached, but only the execution of it in fact: and, unless it was executed in fact as alleged, the defence must fail. The materiality of this consideration may be illustrated by supposing the following case:—Goods were shipped abroad, to be delivered in England. By the charterparty freight for the carriage of the goods is made payable within a limited time—suppose ten or fourteen days after the delivery of the goods; and by the bill of lading the goods are to be delivered to the shippers or their order, paying freight according to the charterparty. In such case, the goods would be delivered to the order of the shippers before the freight for the carriage of the goods would become payable. It might, therefore, be insisted by the consignees, that, at the time of the delivery of the goods, no lien had attached, the times for delivering the goods and for payment of the freight not being contemporaneous: yet, if the consignees claimed the

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goods as holders of the bill of lading, they would, by taking under the bill of lading, become liable to perform the condition of it, and to pay the freight at the expiration of the stipulated time; for, if a person accept any thing which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself; and the law may very well imply a promise to perform what he has so taken upon himself (*a*). In this state of things, therefore, if the consignees, in the character of execution creditors, could get the goods out of the possession of the ship owner before the freight had become due, without resorting to the bill of lading, they might refuse to pay the freight, and leave the ship owner to his remedy against an insolvent shipper. It would, therefore, become an important question whether the goods were really taken and sold by the sheriff by way of levy of a debt in execution, or whether the writ of execution was not employed as the means only of getting the goods into the possession of the consignees, to be dealt with by them as they should think fit under the consignment, without producing the bill of lading. As consignees, they could have no right to the possession without claiming under the bill of lading; and, as execution creditors, they could not justify taking possession except for the purpose of levying their debt by the hands of the sheriff.

Much embarrassment seems to have arisen in this case from the use of the word "purpose." What was the *purpose* of levying an execution on the goods, is one question; and, whether the goods were disposed of for the purpose of levying an execution upon them, is another and very different question. The first assumes an execution to have been executed; the other raises the issue whether an execution was executed or not. If there was a real execution in this case, the allegation in the plea was main-

(*a*) Abbott on Shipping, 5th edition, p. 286.

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tained; if there was no such execution, it failed. The ground, therefore, upon which my answer to your lordships' question is founded, is, that the evidence therein mentioned tended to shew that the act done by the defendants was not the act alleged in their plea as part of their excuse, viz. an execution to levy upon the goods, but an act of a different character.

For these reasons, I am of opinion that it was competent by law, on the pleadings mentioned in your lordships' question, for the plaintiff to shew at the trial, in maintenance of his action, that the acts of one defendant were not really done under or in execution of the writ, but under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods.

Mr. Justice J. PARKE.—To the questions submitted by your lordships to his Majesty's Judges, I answer, that, in my opinion, it was not competent to the plaintiff, upon these pleadings, to give in evidence that the act of the defendants was not really done in execution of the writ, but for another purpose, under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. One defendant states a judgment, and both a writ of execution against the goods of A. B., the delivery to the sheriff of that writ, that there were goods of A. B. in the place where the trespasses were committed, and that the defendants were entitled to seize, and did seize and sell the goods under the writ. There is an admission of the judgment and writ in the replication, and a traverse of the *residue of the cause*. There is also a new assignment of trespasses at other times, on other occasions, and for other and different purposes; and also alleging excess: and the question is, whether the above evidence was admissible, either on the traverse of the residue of the cause, or the new assign-

ment. I propose to consider these two parts of the question in an inverse order; for, there is no difficulty about one, and the other requires further consideration.

First, then, with respect to the new assignment—It is clear that the office of a new assignment is to correct a mistake occasioned by the generality of the declaration, and to explain that the plaintiff is proceeding for a different cause of action from that mentioned in and justified by the plea: it admits that the trespasses intended by the plea are not those for which the plaintiff seeks redress. If the plaintiff is seeking to recover for the trespass mentioned in the plea and justified by it, he must reply, and either traverse or confess and avoid the matter of the plea. Now, in this case, the plaintiff is in truth, as appears from the evidence offered, insisting that the same acts attempted to be justified by the plea were not justified by it. The evidence applies to the acts mentioned in the plea, and not to other and different acts on another and different occasion. But it has been contended that the new assignment may be treated as if, after traversing the matters in the plea, it had gone on to aver *that the trespasses mentioned in the plea were done for other and different purposes than those in the plea mentioned;* that, under such a new assignment, it is clear the evidence would have been admissible; that such a new assignment might indeed be demurrable; but that, it not having been demurred to, the evidence may be given under it. To this I answer, that the new assignment does not contain any averment that the trespasses *mentioned in the plea* were done for other and different purposes. If it had, it would have been bad on demurrer to so much of the new assignment; and if it had contained that averment alone, viz. that all the trespasses in the plea were committed for a different purpose, it would have been bad altogether; for, then the replication and new assignment would have contained two answers to the same trespasses mentioned in the plea—one, a denial of the truth of the several matters comprised in the traverse absque

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residuo—another, that the same trespasses were done for other purposes. And it was on this ground that the replication and new assignment were held to be bad in the case of *Cheasley* v. *Barnes* (*a*); besides its being objectionable on another ground, which I propose to consider hereafter, viz. that the purpose could not be inquired into at all. If there had been a demurrer to *this* new assignment, the answer would have been, that the plaintiff meant (as he had a right to do, under this declaration, which is not for a single trespass) to insist on other trespasses committed at other times, and unconnected with the writ of execution, and not those attempted to be justified; and to apply the declaration, which contains an averment of trespasses committed on divers days and times, to such other trespasses; and such answer would have been a good one. The new assignment would, therefore, have been good on demurrer. And, as the defendants must clearly have the power of objecting *at some time*, it follows that it was open for them to contend, on the trial, that the plaintiff had no right to give in evidence, under the new assignment, that the entry justified by the plea, as having been made by virtue of the writ, was made for a different purpose; and that was the first time at which it was competent for them to take the objection. It is also clear that the part of the new assignment which relates to excess is inapplicable to the evidence offered; the excess alleged appearing by the record to be the use of excessive and unnecessary force and violence. It is clear, therefore, as it seems to me, that the new assignment will not authorize the reception of the proposed evidence. And it is to be observed that it was on the ground of the new assignment only that the Court of Exchequer Chamber decided that such evidence was admissible in the present case (*b*).

The question, therefore, is reduced to this, whether, on

(*a*) 10 East, 73.

(*b*) See 1 Moore & Payne, 783; S. C. 4 Bing. 729.

the general traverse of the residue of the cause, such evidence is admissible. *The replication admits the judgment and the writ*; and therefore I conceive it to be clear that the party so admitting cannot say there was, in point of law, no judgment and no writ. If by the terms "colour and contrivance," in the question submitted by your lordships, it is meant to be suggested that these were fraudulent and void, and supposing even that the sheriff was a party to the fraud (which the evidence offered does not prove), I conceive that such fraud should have been replied specially in avoidance of the judgment and writ. Supposing, then, the judgment and writ to be valid, which I think the pleadings admit, the question is, whether, upon this traverse, the plaintiff can be permitted to shew that the defendants did not enter under the writ and in execution of it, but that they entered nominally under the writ, but in reality under a different claim. This is a question of some nicety and difficulty. But, upon the best opinion I can form, I must say that it appears to me that he cannot; and that there should have been a special replication, in order to enable him to do so. The plea, as stated in the question proposed by your lordships, does not justify the taking of the plaintiff's goods, nor does the plea in the case argued at your lordships' bar: but it goes on to state that the goods of A. B. which were taken, were sold; and the plea upon the record in this cause also states that part of the money was levied by the sale of the goods, and paid over to the execution creditor.

In order to make the question clearer, I shall consider how it would have been if the plea had not stated the sale of the goods; and afterwards, whether the introduction of that averment makes any difference.

Supposing the plea to have done no more than state the judgment, the writ, the delivery to the sheriff, that there were goods in the house liable to be taken under the execution, and that the defendants entered the house to seize

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and did seize the goods under the writ, the question is what the traverse absque residuo causæ puts in issue. It certainly puts in issue the delivery of the writ to the sheriff before the seizure, the existence of goods of A. B. in the house liable to be seized under the execution at the time of the entry, and, in this case, it may be, the seizure also. Does it put in issue the intention and purpose which the defendants had in making the entry? This is precisely the same question which would have arisen if the delivery of the writ and the existence of the goods in the house had been admitted, and the replication had traversed, without any special inducement, the entry so made under, or, in the usual language of pleading, *under and by virtue of*, the writ. Now, I take it to be perfectly clear and settled law, that, if a man has a legal authority by writ or otherwise to do all that he does, it is quite immaterial whether he intends to use that authority or not, or even declares that he does not intend to use it. If he is authorized by a writ, or in any way, to do a particular thing, and he does it in the manner in which he is authorized, he does it *by authority of the writ*, or, which is the same thing, "*under and by virtue*," or, "*by force*," of the writ. One of the earliest authorities is in Fitzherbert's Abridgment (*a*): "If a man take a distress for one thing, still, when he comes and pleads, he may avow for whatever thing he pleases." And in *Groenvelt* v. *Burwell* (*b*), Lord Holt refers to this case, and says—"The single question is, whether he has *good authority at the time of the arrest;* as, if a man distrain his tenant for that which he cannot justify, but at the same time rent is in arrear, he may avow for the rent in arrear, and he is not obliged to avow for that for which he took the distress; nor can the plaintiff traverse the taking for the rent in arrear, but can only plead in bar to the avowry, riens in arriere." "So,"

(*a*) Title "Avowry," 232. (*b*) 1 Lord Raym. 454.

he says, referring to the particular case, "the plaintiff cannot say that Cole did not take him by virtue of the good warrant, for, if he had such a warrant in his custody at the time of the arrest, he was arrested by it." So, in the same case (*a*), Lord Holt says: "It is not what he declares, but the authority which he has, which is his justification." In *Crowther* v. *Ramsbottom*, Lord Kenyon says: "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent and avow for heriot service." He goes on to say: "Now, it appears that the defendant was justified under the process of the county court in entering on the plaintiff and taking his goods, in order to compel an appearance: and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause." And Mr. Justice Lawrence gave the same opinion. It is to be remarked that in this case there was the clearest evidence that the defendant entered, not for the purpose of distraining to compel an appearance, but to compel the payment of the debt under colour of process; it even appeared that he kept the goods seized for four days after the tender of the appearance money: and yet it was held that the replication admitting the writ and traversing the residue of the cause, did not put in issue the question whether the goods were seized "by virtue of the precept." It appears to me, therefore, that these authorities clearly establish the general proposition, that, if a man is authorized by law to do the act which he does, he is justified in doing it, whatever his object or intention may be at the time he does it; and therefore, where a sheriff has a writ authorizing the seizure of certain goods, and he seizes those goods, he has

(*a*) 12 Mod. 386; Com. Rep. 78.

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a right to say, in point of law, that he seized under the writ.

But it has been contended that there are authorities which shew that an averment that a fact was done by virtue of a writ, or, in technical language, a virtute cujus, is traversable; and that therefore it might properly be put in issue in this case. It is true that there are such authorities: but they are all cases in which the traverse included some matter of fact, or in which the question raised by it was whether the writ really authorized the act, and not what the intention or purpose of the party having the writ was; and in all the inducement to the traverse shewed that the meaning of it was, not to put in issue a matter of law, but the question of fact whether those circumstances existed which were necessary to make the writ a sufficient authority to do the act justified. Thus, in *Beale* v. *Simpson* (*a*), the principal authority on this subject, which was an action against a bailiff of a liberty for an escape, the plea was that the debtor was carried from the prison of the liberty to Westminster, under a habeas corpus issued in Hilary, returnable in Trinity Term, and delivered to the sheriff before the escape: the replication stated, by way of inducement, that another habeas corpus was issued in Hilary, returnable in Easter Term, *and after the return of that writ*, and not before, the debtor was taken out of prison and brought to Westminster, and then the defendant by covin procured another writ, tested before and returnable in Trinity Term, which was delivered to the defendant after the debtor was so brought, and not before; by virtue of which last writ, the debtor was brought into Court, and then committed to the Fleet; and the replication concluded with a traverse, without this that the defendant by virtue of the writ in the plea mentioned took the body of the debtor out of the prison of the liberty, and

(*a*) 1 Lord Raym. 408.

carried him to Westminster, as averred in the plea. Now, the majority of the Judges in this case were of opinion that the traverse was good, as it involved matters of fact; and Mr. Justice Powell mentions the removal from prison as one—Lord Chief Justice Treby contra. But it does not involve the question of the intention of the defendant when he removed the debtor; it involves the question whether the debtor *was* taken from the prison; also the question whether the writ in the plea mentioned really did authorize the removal: and it did not certainly, if it was issued and delivered to the sheriff after the removal. In the case put by Mr. Justice Powell, the same observation applies. The case is this: If two writs be delivered to the sheriff against A., one at the suit of B. returnable on the first return of Hilary, another at the suit of D. returnable on the last return of the same term, and D. procures a warrant on his writ, upon which A. is arrested after the return of B.'s writ, and then gives a bail-bond for his appearance; and in a suit upon this bail-bond, A. pleads that he was arrested upon the writ of B., returnable the first return of the term, and that he gave the said bail-bond after the return of the writ, by which it was void. The sheriff replies the other writ at the suit of D., and that A. was arrested, and absque hoc the arrest was by virtue of the writ of B. There, it is clear that B.'s writ did not authorize the arrest at the time it was made, and the taking of the bail-bond. In *Foster* v. *Jackson* (*a*), the plea to a scire facias on a judgment against executors, was, that the original defendant was taken by the sheriff by force of a capias ad satisfaciendum. The replication was, that the sheriff did not take by virtue of the capias. It is clear that the taking is involved, and probably also the existence of the writ itself, as well as its delivery to the sheriff; and besides, the question there arose, not on demurrer to the

(*a*) Hobart, 52.

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replication, but after verdict. In the case of *Bennett* v. *Filkins* (*a*), the traverse (which however was objected to by Saunders) is good on the same ground.

The result of these authorities is, that the virtute cujus may be traversed where it involves matter of fact, and the question whether the writ did or did not authorize a particular fact, that is, whether those circumstances existed which gave it authority; but it is not traversable where it involves a mere matter of law: and if a man has the authority of a writ, and does the act authorized, and no more, it is a matter of law that he is justified in the act, whatever the intention may be. An averment that an act was done under and by virtue of the writ is equivalent to an averment that it was done by authority of the writ, or, in other words, that the writ authorized the act to be done. If, indeed, the authority of the writ be not pursued, but some act be done by the party who has it, *inconsistent with its authority, and an abuse of it*, then the law adjudges by the subsequent act quo animo the party did the thing complained of, and the defendant will derive no justification from the authority which he had—*The Six Carpenters'* case (*b*): but it is to acts done, and not to declarations and intentions, that the law looks (*c*); for, the law doth respect deeds, but words without an act done are not in this case regarded by law: and Lord Coke then instances a case of a distress for one thing, and an avowry for another. But it is quite clear that all acts done which make the party unjustifiable under the authority of the law, and a trespasser ab initio, cannot be given in evidence under the general traverse, but must be specially replied (*d*), *Dye* v. *Leatherdale* (*e*), *Taylor* v. *Cole* (*f*), *Gundry* v. *Feltham* (*g*). If acts done, by which the *intention* of the party is less une-

(*a*) 1 Saund. 20.
(*b*) 8 Rep. 146 a.
(*c*) Per Lord Coke, 3 Rep 26 a.
(*d*) 1 Wms. Saund. 300 *d*, n.
(*e*) 3 Wils. 20.
(*f*) 3 Term Rep. 292; 1 H. Blac. 555.
(*g*) 1 Term Rep. 338.

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quivocally demonstrated, cannot be given in evidence under the general traverse, why should other more equivocal proofs of the intention from declarations be admissible? In truth, looking by way of illustration to the evidence offered on the trial, which appears on the bill of exceptions in the case itself, the strength of the case is that the goods were delivered over to Hopley & Linghams, the execution creditors, by the defendant, the sheriff. This is an act done, which is the strong, and indeed the only evidence of the defendant's intent and purpose; and surely this, upon the supposition of the state of the pleadings on which I have been arguing, is matter which should have been replied.

For the reasons I have above given, I conceive it to be clear that a man, whatever his purpose may be in acting according to the authority of a writ, is justified by it, *if he acts according to it;* but, if he does an act inconsistent with its authority, he is no longer justified by it, but is either a trespasser ab initio, or is liable to another action, according to the nature of the inconsistent act so done. In the present instance, therefore, if the plaintiff had replied that the goods were delivered up by the sheriff to the execution creditors otherwise than by virtue or in execution of the writ, it would have been a good answer, but it is no answer, as a proof of the *intention* of the defendants, under the general traverse.

I have so far argued the case on the supposition that the plea justified the trespass to the house, by the statement of the writ and delivery to the sheriff and seizure of goods in the house liable to the execution, and omitted all mention of the subsequent sale or the levy and payment to the execution plaintiffs.

The next question is, whether the averment of the sale, or of the levy, or of both, makes any difference. Now, it is to be observed that the plea does not justify seizing the plaintiff's goods, but only the entry into the plaintiff's

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house: and the question is whether the unnecessary averment that the goods had been sold, &c., is involved in the issue that the defendants committed the trespasses without the residue of the cause alleged in the plea. I take it to be clear that the plea need have stated no more than the judgment (in the plea by the creditor), the writ and entry under it, and the seizure of the goods of A. B. under the writ (if, indeed, even that was necessary in the pleas by both); and that, if it had omitted to state that the goods had been sold, it would have made no difference: and it is a general rule in pleading, that an unnecessary averment, if capable of being separated without injury to the sense, need not be proved. That so much of this plea as relates to the sale and levy may be so separated, admits of no doubt. Suppose that, under these pleadings, the defendants had never sold at all, but, having really entered and seized in order to execute the writ, they had kept the goods unsold for want of buyers; would not the defendants have been entitled to a verdict? and, if so, it must be on the ground that the statement as to the sale is immaterial and may be rejected. I think, therefore, that the averment of the sale in this case is immaterial. But that is not the question proposed by your lordships—whether it was necessary under these pleadings to prove the sale of the goods and payment of the money: the question is a different one; and I feel satisfied that it was incompetent for the plaintiff, upon the pleadings stated in your lordships' question, to give evidence that the acts of the defendants were not really done under and by virtue of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods.

Mr. Justice GASELEE.—Having attentively considered the questions put by your lordships to the Judges in this case, I continue of the opinion in which I concurred in the Court below, that it was competent by law, on these

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pleadings, for the plaintiff to shew at the trial, in maintenance of this action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. The difference between this case and those of *Groenvelt* v. *Burwell* and *Crowther* v. *Ramsbottom*, which are principally relied on by the plaintiffs in error, is so fully stated by the late Lord Chief Justice of the Court of Common Pleas, in giving the unanimous judgment of the Court of Exchequer Chamber, and by some of my learned Brethren to your lordships on this occasion, that it would be an unnecessary waste of time to go over them again at any length. The main difference is, that, in those cases, what the defendants in their pleas professed to have done, they had done. Here it is not so: they have not executed the writ: they have not made the debt of the goods, and paid it over to the creditors; but have delivered over the goods themselves, not in satisfaction of the debt, as directed by the writ, but to the importers claiming under a bill of lading, and seeking to avoid any question of the payment of freight or any other charge upon which any question might arise. This I am inclined to think also satisfies the new assignment. But it is said, it was not competent to the plaintiff below to reply and also to new assign; because it is alleged that there is only one trespass in the declaration: and for this is cited the case of *Cheasley* v. *Barnes*. Upon referring, however, to the statement of the declaration in the question put by your lordships, and also to that contained in the bill of exceptions, the trespasses will be found in both to be charged to have been committed diversis diebus et vicibus; in which case it is admitted the plaintiff may reply and new assign; and although the precise terms of the new assignment are not stated, enough of it is set out to shew, as the fact is, that

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it states the plaintiff to have brought his action, not only for the trespasses in the pleas mentioned, and thereby attempted to be justified, but also for that the defendant committed trespasses at other times and on other occasions and for other purposes; under which, supposing it to be held that the seizing the goods is justified under the pleas, the afterwards delivering them over to the defendants below, instead of making the debt of them, and paying the money over to the creditors, may be given in evidence. But, admitting it to have been wrong to reply and also new assign, it seems to me, that, as the defendants below have not demurred, it is now too late to take advantage of the duplicity. But, if I am right as to the first point, the question as to the new assignment is immaterial.

Mr. Justice LITTLEDALE.—On first considering the question stated by your lordships for the opinion of the Judges, I felt a difficulty in giving an answer to it. The action is brought for breaking and entering the plaintiff's house and taking his goods: and the justification is under a writ of fieri facias to take the goods of A. B. Generally speaking, the plaintiff's goods could not be taken under an execution against the goods of A. B. But I must assume that the plaintiff has something to do with the goods in such a way as that they may be called his goods; and also that the property of the goods is in A. B., and that they are liable to be taken in execution absolutely; because, if the plaintiff had such an interest in them as that they could not be taken in execution absolutely, but only subject to any claim which he might have either by the goods being let to hire or pledged or pawned with him or by having a lien upon them; then, though the goods might be seized pro forma, they could not be removed, and the defendants' plea of justification would fail altogether: and then, on the other hand, if the goods were the property of A. B., liable to be taken in execution, the plaintiff would

appear to have nothing but the possession of the goods, and could not maintain an action against persons who stand in the place of the owner of the goods; and the sheriff might justify entering the plaintiff's house to take the goods. But, laying aside these considerations, the first point I notice is the allegation of excess. It does not appear that any excess was proved, and it forms no part of your lordships' question. The next point I notice is, how far the new assignment bears upon the case: and, as to that, I think a new assignment is not applicable to it. In case of a single trespass in the declaration, and a plea justifying it, the plaintiff cannot both reply and new assign; as that would be giving a double answer to the plea —*Cheasley* v. *Barnes* (*a*), *Franks* v. *Morris* (*b*), *Taylor* v. *Smith* (*c*). But, in the present case, the trespass is laid on divers days and times; and therefore, in point of form, as to the pleadings, the plaintiff might new assign, and might also at the trial give in evidence trespasses committed on other occasions and for other purposes than are alleged in the plea. Now, the occasions and purposes mentioned in the plea are, the acts done in executing the writ of fieri facias; and, upon a denial and traverse of the facts stated in the plea, the plaintiff may shew that the defendants did not do the acts complained of in executing the fieri facias, for that is part of the issue raised by the replication. What the plaintiff would propose to give in evidence under the new assignment, of other occasions and for other purposes than those mentioned in the plea, is, that the acts of the defendants were not really done in execution of the writ, but for another purpose and under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. It appears to me that that is the same thing as the traverse raised by the replication, and more pro-

(*a*) 10 East, 73. (*b*) 10 East, 81, n. (*c*) 7 Taunt. 156.

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perly raised by that than in making a new assignment (*a*). In fact, the whole is one entire act, and may be treated as one trespass, though different things were done on different days. I think, therefore, that the plaintiff could not maintain his action by resorting to the new assignment. And, in answer to your lordships' question, as far as arises upon the plea and replication, I think, that, if the evidence was to prove that the goods were never seized in execution at all, then the plaintiff might shew that the acts of the defendants were not really done under or in execution of the writ, but for another purpose and under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods. But, if the goods were once actually taken in execution, then I think that evidence would not be admissible.

With regard to the first part of what I have stated as my opinion, I assume, though your lordships' question does not so state, that the plea alleges that the goods in the plaintiff's house were liable to be taken in execution, and that such was the fact: and then the other material allegation in the plea, which falls in the general traverse—without the residue of the cause—is, whether they were taken under the writ; and that I think is a material point of traverse. At common law, the fieri facias had relation to the teste, and bound the defendant's goods from that time; so that, if the defendant had sold the goods, they were liable to be seized in execution. This was altered by the statute of frauds, which enacted that the property should be bound from the time of the delivery of the writ to the sheriff. The meaning of that is, that, after such delivery, if the defendant make an assignment of the goods, the sheriff may take them in execution. But neither before nor since is the property of the goods altered, but

(*a*) See *Oakley* v. *Davis*, 16 East, 82.

continues in the defendant till execution executed. The execution is not executed till actual seizure under the writ; and till such seizure, in case of an act of bankruptcy the assignees would have a preferable claim to the judgment creditor. But, if the mere delivery of the writ to the sheriff was sufficient to constitute a seizure, then the inquiry at Nisi Prius which is now made, whether the seizure or act of bankruptcy was first in time, would be changed to whether the delivery of the writ to the sheriff or the act of bankruptcy was first in time.

But it has been argued that the virtute cujus is not traversable. And I admit, that, where those words, or pretextu, or per quod, introduce a consequence or inference of law from the preceding matter, they are not traversable, but that the preceding matter alone is so. Many cases are referred to as to that position, in the notes to Williams's Saunders (*a*). In the case of *Bennett* v. *Filkins*, Saunders, who was counsel for the defendant, thought that the plaintiff would have objected to the traverse, because it was "without this that Kingswell was in prison by virtue of the warrant," and he said "by virtue" ought not to be traversed. And so also in *Green* v. *Jones* (*b*), where the defendant had shewn that a bill of Middlesex was sued out, per quod the sheriff made his warrant, and so he had not alleged any thing traversable except the per quod. And the Court seem to have thought that the per quod was not traversable. And in the report of this case in Keble (*c*), the Court agreed that virtute cujus is not traversable, but only the issuing the writ, or, that he had no warrant. In *Beale* v. *Simpson* (*d*), Lord Chief Justice Treby refers to this case of *Green* v. *Jones* as having decided that a per quod or a virtute cujus is not traversable. And he adds: "When one says that such a thing was done by virtue of a writ, it is

(*a*) 1 Wms. Saund. 23.
(*b*) 1 Saund. 298.
(*c*) 2 Keble, 607.
(*d*) 1 Lord Raym. 410.

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meant, by authority of the said writ, by operation of law, without any ingredient or mixture of matter of fact; and a mere matter of law is not to be traversed and tried by a jury." And he afterwards further adds: "The virtute cujus, per quod, pretextu, or vigore cujus, introduce a consequence of law only from the matters of fact before stated:" and then he refers to several authorities, which are stated in the report, where it is agreed that the virtute cujus never introduces any new matter, but only collects the matter before. Mr. Justice Nevill and Mr. Justice Blencowe agreed with Mr. Justice Powell, who had before delivered his opinion, that, generally, virtute cujus is not to be traversed, containing matter of law; but, when it is mixed with fact, then it may be traversed. And in that case these three Judges held, against the opinion of Lord Chief Justice Treby, that the taking out of prison was traversable. In *Foster* v. *Jackson* (*a*), the traverse was allowed; but that was after verdict, and therefore does not so much bear upon the point. In *Groesvelt* v. *The College of Physicians* (*b*), the traverse was, that the plaintiff was not arrested by virtue of the warrant stated in the plea; and that traverse was held bad. The case of *Beale* v. *Simpson* appears to me to unravel the whole of the difficulty as to the virtute cujus and similar expressions not being traversable; that the reason is that it only collects the matter alleged before, and draws a conclusion from it, and then, being matter of law, it is not traversable; but, where it is mixed with matter of fact, then it is traversable. Now, in the present case, if the law were, that goods are to be considered as taken in execution by the mere delivery of the writ to the sheriff, then I entirely agree that the allegation by virtue whereof the sheriff seized the goods in execution, would be an inference of law, and therefore not traversable: but, as I am of opinion that the delivery of the writ to the sheriff does not of itself constitute a taking

(*a*) Hob. 52. (*b*) 12 Mod. 386; 1 Ld. Raym. 454; Com. Rep. 76.

the goods in execution, I think the seizure of the goods by virtue of the writ is not a matter of law, but is a matter of fact whether the sheriff seized by virtue of the writ or not, and therefore is traversable. I may remark, that, if any particular technical effect is to be given to the words "by virtue whereof," they are not a necessary allegation in the plea, and may be treated as surplusage. It would be sufficient to allege, after the making of the warrant, that the bailiffs took the goods in execution. This expression, however, although it avoid the virtute cujus, comes really to the same thing; and the point on this part of the argument is, in effect, whether the delivery of the writ to the sheriff in point of law amounts to a seizure of the goods in execution, so as to say that the making of the seizure in execution, or under the writ, or similar language, is a matter of law. If it does not, then it is a matter of fact, and traversable.

On the second point, I think if there was once an actual seizure, that was an execution executed, and the evidence in your lordships' question was not admissible. I do not think it can be inquired into, what motive the defendant had in suing out the writ: if there was a valid debt and judgment, he had a right to sue out a writ of execution; and, though his object might be by means of that to get possession of the goods, which he could not otherwise so easily have done, and thereby to acquire some benefit to himself which he could not have had but for the writ, I do not know why he cannot make use of a lawful proceeding to acquire that advantage. And that such motives and objects are not inquirable into, sufficiently appears from *Crowther* v. *Ramsbottom*, in which I entirely concur, if the writ be once executed. The nature and object of the other purpose, and the claim, is not stated in your lordships' question; and I am not at liberty to refer to the bill of exceptions, but must confine myself to the questions submitted to the Judges. But it does not appear from the question that the ulterior object he had in

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view was unlawful, and therefore, if he executes a lawful writ, and it does not appear that his ulterior object was for an unlawful purpose, the only detriment that the plaintiff could sustain is, that the defendant has a better means of enforcing his claim. I do not see what damages in point of law the plaintiff has sustained. But then, it is said, though the mere delivery of the writ to the sheriff may not amount to execution of the writ, yet, if the same person who is sheriff seizes the goods for quite a different cause from any thing connected with the writ, and which he shews to be different both by his words and acts; yet nevertheless that is in point of law a seizure under the writ; and, if an action of trespass be brought against him for the seizure, he may treat that seizure as a seizure under the writ, and justify accordingly. And several cases are cited, which, it is said, shew the law to be, that, if a man has two authorities to take goods, and he takes professedly under one, he may afterwards justify in trespass or avow for the other. In *Butler* and *Baker's* case (*a*) it is said, that, if a man takes a distress for one thing, yet, when he comes into a Court of record, he may avow for what thing he pleases: for which is cited Fitzherbert's Abridgment (*b*). And so, in an anonymous case in Leonard (*c*)—A. distrains, and, being asked for what cause he distrains, he assigns a cause which is not sufficient, and afterwards an action is brought against him; he may avow the distress for another cause. In *Groenvelt* v. *The College of Physicians*, it is said by Lord Holt, in giving the judgment of the Court: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for, it is not by what he declares, but the authority he has is his justification:" and then he adds what I have above mentioned from Lord Coke's Reports, as to the distrain-

(*a*) 3 Rep. 26 a. (*b*) Title "Avowry," 232.
(*c*) 2 Leon. 196.

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ing for one thing and avowing for another. In *Crowther* v. *Ramsbottom* (*a*), Lord Kenyon repeats what I have before mentioned as to distraining for one thing and avowing for another: and he adds, that it appears the defendants were justified under the process of the county court in entering upon the plaintiff and taking his goods in order to compel an appearance; and therefore the question ought not to have been left to the jury to say whether they entered for that or some other cause. And Mr. Justice Lawrence quotes what I have above mentioned, from Lord Holt, and adds, it was not essential to inquire what the defendants said when they entered and seized, but only whether they had in fact a legal warrant to justify them. These authorities are certainly very difficult to grapple with. I do not mean to say they are not law; because so old an authority as that is from Fitzherbert, and that continued down to Lord Coke and Leonard's Reports, and further continued to a more modern time, in *Groenvelt* v. *The College of Physicians*, and again recognized and confirmed in *Crowther* v. *Ramsbottom*, are not to be lightly dealt with; and I must either subscribe to that doctrine, or say they are not law, or distinguish them so as to reconcile them to the opinion I am now delivering. I think that these cases are law; but I think the rule should be confined to those cases where the seizure has been made under the process of the law; and then, when a man seizes goods where he has two rights of seizure of goods or of the person, either under the process of Courts or by distress as to goods, he may be taken to have seized or imprisoned under all the different authorities which he has at the time; and, when he comes to justify in trespass, or avow in replevin, he may use whichever of the authorities he thinks proper: and that rule would reconcile all the cases as to distraining for one cause and avowing for another. And so also,

(*a*) 7 Term Rep. 654.

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in *Groenvelt* v. *The College of Physicians*, the rule laid down may well apply; because, if a sheriff has a man in custody at all, he is as a matter of law in his custody in all actions in which the sheriff has any process of detainer against the person (*a*); and therefore, if he be in his custody by operation of law, the sheriff may justify under any process which he has against the party: and it is quite evident from what is said in giving judgment in that case, that there was another writ or warrant besides that which was the subject of the traverse. And it is quite evident from the reasoning and the grounds of the judgment in *Groenvelt* v. *The College of Physicians*, that there were two warrants against the plaintiff: and in all these cases lastly referred to there were two authorities; and therefore they fall within the restriction of the rule.

In *Crowther* v. *Ramsbottom*, however, there was only one authority, and Lord Kenyon and Mr. Justice Lawrence nevertheless apply the same rule of law. But then in that case it is quite clear that there was a seizure under the process of the Court, and that the process was executed, and therefore the verdict was wrong, and there ought to be a new trial; and it very well might be, that, if the sheriff seized under the writ, it should not be inquired into what his object was, whether to compel an appearance or to compel the plaintiff to pay the debt and costs; and therefore, if he ever executed the writ, the law would say what was the effect of that, and it was not competent to inquire what his object or motive was in executing it. And therefore, I admit that that case may in a certain degree appear to militate against my opinion, because that opinion is only that the proposed evidence is admissible to shew in fact whether the goods were seized under the writ or not; but that was not the point there, which appears to have been as to the object he had in view when he executed the writ.

(*b*) See *Barratt* v. *Price*, ante, Vol. 2, p. 651.

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I may here notice that some cases have occurred where two writs of fieri facias have been delivered to the sheriff at the suit of different plaintiffs at different times, and the sheriff has seised under the second writ first; and questions have arisen as to the right of the plaintiff under the first writ to priority, and as to the liability of the sheriff—as, *Smallcombe* v. *Buckingham* (a), *Hutchinson* v. *Johnson* (b), *Rybott* v. *Peckham* (c), *Payne* v. *Drewe* (d), and *Jones* v. *Atherton* (e); in which last case Lord Chief Justice Gibbs says: "The writ which first comes to the sheriff's hands must have priority;" which shews that the second writ is to be considered as operating in favour of the first; and that, when the sheriff has a writ in his office, though he issue no warrant on it, if he afterwards get possession by any other means (professedly, perhaps, under another writ), he must be taken to hold the goods under the former. In all these cases, there was an actual seizure under one writ or the other. And though, in the last case, Lord Chief Justice Gibbs uses a very general expression, that, if the writ be in the office, and the sheriff gets possession of the goods by any other means, that must be taken to be in his character of sheriff, and not, as in the present case, under a claim which, by your lordships' question, I take to be wholly unconnected with any legal process. This case, then, falls within what is my opinion, viz. that the rule should be confined to cases where both the authorities are under the process of the Courts, or a distress.

For the reasons before given, I am of opinion, that, whether the goods were taken in execution under the writ, was a matter of fact to be inquired of by the jury; and

(a) 1 Lord Raym. 251.
(b) 1 Term Rep. 729.
(c) 1 Term Rep. 729, n.
(d) 4 East, 523.
(e) 7 Taunt. 56; S. C. 2 Marsh. 375.

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that the evidence which your lordships have mentioned was admissible in support of the negative of the issue.

Mr. Baron BAYLEY.—The preliminary facts upon which the question from your lordships to his Majesty's Judges is founded, are these:—An action of trespass being brought against a sheriff and another person for entering the plaintiff's house and seizing and taking away his goods on divers days and times, the sheriff pleaded a justification under a writ of fieri facias issued against the goods of A. B. at the suit of the other defendant, averring that goods of A. B. were in the house, and *that he entered the house to seize, and did seize and sell them under the writ.* The other defendant pleaded the same plea, with the addition of the judgment recovered by himself against A. B. The plaintiff replied, admitting the judgment and the writ, and traversing the *residue of the cause;* and also added a new assignment, at other times, on other occasions, *and for other purposes*, and also alleging excess. At the trial it appeared that the sheriff had made a warrant to his officers, who entered the house, and continued therein until all the goods were removed, which occupied three or four days; and that the sheriff was indemnified by the other defendants. Upon this statement, the question your lordships have proposed is this—was it competent by law on these pleadings for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods? I am of opinion that it was. There are three modes in which a plea of justification can be answered—first, by confessing the material facts it states, and by the introduction of additional facts avoiding the effect the facts stated in the plea

would otherwise have—secondly, by traversing all or some of the material facts the plea contains—thirdly by new assigning. In the statement to which our attention is directed, the plaintiff has traversed and new assigned; and, if the evidence offered was calculated to support either the traverse or the new assignment, it was competent to the plaintiff to give it. If it, *i. e.* the evidence offered, is to be considered as confessing all the material facts stated in the plea, and introducing new facts in avoidance of the justification that plea would otherwise afford, it certainly ought not to have been admitted upon the traverse. We must, therefore, see what are the material facts stated in the justifications—what, in the language of the traverse, is "the cause" alleged by the defendants for the trespasses they profess to justify. The trespasses the defendants profess to justify are, the entry into the house, and the seizing of the goods; and the grounds upon which the sheriff professes to justify them is, that he had a writ commanding him to cause to be made of the goods and chattels of A. B. a certain sum of money; that there were goods of A. B. in the plaintiff's house; and that thereupon the defendants, under and by virtue of the writ, entered the house to seize them, and did seize and sell them. The other defendants state that they had a judgment, upon which that writ of fieri facias was founded. Now, what are the material facts alleged in these justifications? Has the sheriff alleged enough, when he has stated the writ, and that there were goods in the house liable to be seized under it? or has the other defendant stated enough when he has added his judgment? Is it not essential that they should go further, and state in fact that they did seize under it? Is there any instance in which such statement is omitted? Suppose nothing stated but the judgment and writ, and the fact that the goods were in the house, would it not have been an unanswerable objection, that you have stated

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grounds which would have justified you *had you acted on those grounds*, but you do not allege that you did act upon them? Suppose the plea had omitted the virtute cujus, and had stated only that the defendants, afterwards, and whilst the judgment and writ were in force, had seized the goods, would not the plea have been open to a special demurrer, on the ground that it did not state that they seized under or by virtue of the writ? Is it a consequence, that, because I have a judgment and writ against a man, under which I *might* seize his goods, that, when I seize his goods, I really do make the seizure under such judgment and writ? I may have a conditional bill of sale from him of those very goods, and may seize under that bill of sale. I may be consignee of the goods from him, and may take under bills of lading he has sent me. The fact, then, that the defendants *might* have seized and would have been warranted in seizing under a judgment and execution, does not exempt them from the obligation upon a justification to state that they *did* so; and, if so, the fact of having so seized is an essential part of the cause stated in the plea, and is liable to be put in issue either by a general or special traverse. Had the writ been a capias ad respondendum, or other mesne process, and the sheriff had justified under it, that it was returned, he must not only have stated that he seized under and by virtue of it, but he must also have stated that he *returned it*—*Freeman* v. *Blewett* (*a*), And why? Because the process will not justify him; he shall not be protected by it, unless he shews that he paid a due and full obedience in acting under it (*b*). So, in *Middleton* v. *Price* (*c*), it was held, that, where an officer justifies under process he ought to return, *he must shew he has done all it was his duty to do;* and, if he must shew it, is it not a traversable allegation?

(*a*) 1 Lord Raym. 632. (*b*) Salk. 409. (*c*) 1 Wils. 17.

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It is said, however, that to include a virtute cujus in a traverse is unwarrantable; and that the better opinion is that it cannot be done. Where a virtute cujus is a mere inference of law drawn from premises previously stated, I agree it cannot be traversed; but, where it is not a legal result, but a mere question of fact, I believe all the authorities are that it may be traversed. If, for instance, you allege that A. was in custody of the sheriff at the suit of B., and that C. who had a judgment against him, delivered a capias ad satisfaciendum against him to the sheriff, *whereby he became and was in custody of the said sheriff at the suit of* C.; a traverse that he *thereby* became in custody at the suit of C. would be clearly bad; because the law says in such case he does become in the sheriff's custody at the suit of C., and the traverse therefore would be the traverse of a mere matter of law. So, wherever a virtute cujus introduces only a consequence of law from matters of fact previously stated, the consequence of law cannot be traversed, but the matter of fact must be the object of the answer. But, where a virtute cujus introduces matter of fact, it may be, and continually is, included in a traverse. In *Foster* v. *Jackson* (*a*), the point traversed was whether the sheriff took J. S. and had him in custody by virtue of a capias ad satisfaciendum. In *Bennett* v. *Filkins* (*b*), where the point upon the pleadings was whether the defendant, when he gave a bail-bond, was in custody under a warrant upon a writ returnable on a Friday, which was before the bail-bond was given, or upon a writ returnable on a Saturday, the day the bail-bond was given; the point traversed was whether he was in custody *by virtue* of the warrant on the Saturday writ: and in *Beale* v. *Simpson* (*c*), the question being under which of two writs of habeas corpus one B. had been taken out of the

(*a*) Hob. 52. (*b*) 1 Saund. 20. (*c*) 1 Lord Raym. 408.

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defendant's custody, the traverse was that B. was taken out of the defendant's custody *by virtue* of the former of the two writs; and this traverse was held to be well taken, by Mr. Justice Powell, Mr. Justice Neville, and Mr. Justice Blencowe, against the opinion of Lord Chief Justice Treby. So much stress, however, has been laid upon the opinion of Lord Chief Justice Treby, that I think it right to shew that it does not militate against the opinion I am humbly submitting to this House. Whoever will carefully attend to the two opinions he delivered, will find that he does not put the case wholly upon the ground that every traverse including a virtute cujus is bad; for, he admits that the traverse in that case would have been good after verdict: his objection rested, in part at least, upon the intricacy of that traverse, and the multiplicity of matter, *i. e.* of fact and of law, which it contained; and he laid considerable stress upon the manner in which that case came before the Court, viz. upon special demurrer The undue reliance, too, he places upon *Green* v. *Jones* (*a*), seems to me to diminish the weight of his authority; for, he considers *that* as a judgment in point; whereas there there was no traverse, only a dictum from Saunders, who was of counsel for the plaintiff. That dictum was, that the defendant had only "shewn that a bill of Middlesex had been sued out, per quod the sheriff made his warrant, so he has not alleged any thing traversable, except the per quod, which is not traversable." The cases, therefore, of *Beale* v. *Simpson* and *Green* v. *Jones* appear to me to furnish no reasonable ground for saying that the including the virtute cujus in the traverse mentioned in your lordships' question in any respect affects the validity of that traverse, or prevents it from including the question whether the sheriff seized *by virtue of the writ*.

(*a*) 1 Saund. 208.

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Two cases, however, were mentioned at your lordships' bar which I think we are called upon to notice, viz. *Groenvelt* v. *Burwell* (*a*) and *Crowther* v. *Ramsbottom* (*b*). In *Groenwelt* v. *Burwell*, the defendants justified an arrest under a sentence and warrant. The warrant directed the officer to take the plaintiff, and deliver him to the keeper of the gaol of Newgate; and the plea alleged that the officer did take him by virtue of the warrant, and deliver him with the warrant to the keeper of Newgate, there to be detained, &c. The replication was, that the defendants took him of their own wrong, and not *by virtue of the warrant*. The replication, therefore, admitted that the warrant had issued, that it was in the hands of the officer, and that what it required, viz. that the plaintiff should be delivered to the keeper of Newgate, had been effected under it. The defendants demurred; and the traverse was held bad, first, because, had the plaintiff been arrested by the officer upon any other warrant, he ought to have shewn it specially, and secondly, because, though he had been arrested under any other warrant, he would *in law* have been arrested under every warrant the party making the arrest had at the time, and consequently was in point of law arrested under the warrant stated in the plea. That traverse, therefore, would have referred to the jury what upon the pleadings was a mere question of law; and was therefore, upon the distinction I have made, clearly bad. In *Crowther* v. *Ramsbottom*, the defendant justified seizing the cattle under a warrant upon a justicies to compel an appearance in replevin, and alleged that, the plaintiff having appeared, the cattle were returned. The plaintiff admitted the justicies, but traversed the residue of thecause. It appeared in evidence, that, when the defendant seized, *he had his warrant with him*, and shewed

(*a*) 1 Lord Raym. 457. (*b*) 7 Term Rep. 654.

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it, and that he returned the cattle when an appearance was entered: but, there being proof that he said at the time he seized that he was seizing for a debt, it was left to the jury to say whether the defendant entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt: and the jury found for the plaintiff. Now, it was clear there that the defendant *entered under the warrant;* he had it with him, and produced it, and the object the warrant was to answer, viz. to compel an appearance, was answered. If he had any ulterior purpose, viz. that of compelling the payment of a debt, the pleadings were not calculated to raise that question: the only issue was, whether the residue of the cause stated in his plea, *i. e.* his having the warrant, and entering under it, were proved. The verdict, therefore, was clearly wrong, and the Court could not do otherwise than grant a new trial. But it is for some expressions which fell from the Court that stress is particularly laid on that case. Lord Kenyon says: "I never understood a man was obliged to justify a distress for the cause he happened to assign at the time it was made. If he had a legal justification for what he did, it is sufficient. A man may distrain for rent, and avow for heriot service. Now, here, it appears the defendants were justified under the process of the county court in entering upon the plaintiff, and taking his goods, in order to compel an appearance; and therefore the question whether they entered *for that or some other cause*, ought not to have been left to the jury. The verdict, therefore, proceeded upon a mistake of the law." Mr. Justice Lawrence, the only other Judge who spoke, referring to *Groenvelt v. Burwell* as in point, observed that the Judge in the case in question "had left to the jury what in *Groenvelt* v. *Burwell* was stated to be immaterial. For, it was not material to inquire what they said when they entered and seized, but

only whether they had in fact a legal warrant to justify them." Now, all expressions are to be considered in conjunction with the facts of the case in which they are used; and in *Crowther* v. *Ramsbottom* there was no doubt, not only that the defendants had the warrant under the justicies at the time they seized, but that they seized *under it*, and enforced the obedience that writ required. At least, there was nothing to shew they had repudiated the right to refer to that warrant as the ground on which they acted. The expressions, then, of Lord Kenyon and Mr. Justice Lawrence, taken in conjunction with the facts of that case, go no further than this, that whoever seizes another's goods, and has a right by warrant, which it is his duty to execute, so to seize them, *and applies that seizure to the purposes that warrant directs*, is not precluded by any thing he says at the time of the seizure from so applying it. But that does not bear, as it seems to me, upon a case *where the officer does not apply the seizure to the purposes of his warrant*, but leaves those purposes wholly unsatisfied. Upon the ground, therefore, that, in *Groenvelt* v. *Burwell* and *Crowther* v. *Ramsbottom*, the warrant was ultimately pursued, and the thing it commanded was enforced, which was not the case here, it seems to me that those cases form no ground for impeaching the opinion I am humbly submitting to the House.

My opinion therefore is, that upon the traverse absque residuo causæ it was competent to the plaintiff to shew that the acts of the defendants were not really done *under or in execution of the writ*, but for another purpose and under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods; and that what the writ required, viz. to cause the debt for which the judgment was obtained to be made, was never effected or attempted. This being my opinion, it is unnecessary to say any thing upon the

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new assignment. I will only observe, that, unless the plaintiff prove more trespasses than the plea, if unanswered, necessarily covers, he cannot both reply to the plea and new assign: he may do *either*, not both.

Lord WYNFORD (in the absence of the Lord Chancellor) intimated that the judgment of the Court of Exchequer Chamber was affirmed.

Judgment affirmed.

In the Common Pleas.

MICHAELMAS TERM, 4 WILL. IV.

RIDDELL, Widow, *v.* JENNER and Others.

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THE following case was sent by the direction of his Honor the Master of the Rolls for the opinion of the Judges of this Court:—

The plaintiff filed her bill in Chancery, in October, 1831, thereby (amongst other things) stating, that, in the year 1617, the customs of the manor of Cheltenham, in the county of Gloucester, were duly found, returned, and presented by a jury there summoned for the purpose of ascertaining such customs, to be (amongst other things) as follows—first, The tenants in base tenure of this manor do respectively hold and are seised of their tenements of an estate of an inheritance customarily, viz. sibi et hæredibus suis, descendible to their youngest sons; and, in default thereof, to their youngest daughters; and, in default thereof, to their youngest brothers; and, in default thereof, to their youngest sisters, &c.; according to the custom of the said manor: Also, if any customary tenant aforesaid make his fine for his admittance, and die leaving a wife, she is to have the land or tenement whereunto her said husband was so admitted, for her life, and twelve years, if she shall dispose of it; and, if the wife shall marry

J. R., tenant of customary lands in the manor of Cheltenham, aliened them during the coverture, without his wife having been solely and secretly examined in court, or joining in the surrender thereof:—*Held*, that, according to the custom of the manor, as settled by the 1 Car. 1, c. i, the widow of J. R. was entitled to dower out of such customary lands, although her husband did not die tenant thereof.

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again, and her husband that she shall so marry shall agree with the lord and make his fine, then shall he gain and have the land or tenement, to him and his heirs, of an estate of an inheritance, descendible to his youngest son, or, in default thereof, to his youngest daughter, according to the custom of the manor; and, if he outlive his wife, and die without issue of his body, his customary tenements shall go to the youngest issue male of the body of the said first husband, by whom the land did move; and, for default of such issue male, then shall go to the youngest issue female of such first husband; and, if such first husband be dead without such issue of his body, then doth it go to the kindred of every last husband, in order, so long as any can be found being heirs by descent, or takers in marriage by purchase; that is to say, if he be a taker, then only to the issue of his body in manner as aforesaid; and, if he be heir, then in full course of descent according to the custom of the manor: And that such customs continued to be the customs of the said manor until after the passing of the act of parliament next after mentioned; and, after the passing of such act of parliament, such customs remained, except in so far as such customs were altered or varied by such act of parliament.

The case then set forth the statute 1 Car. 1, cap. (Private act), intituled—An act for the settling and confirmation of copyhold estates and customs of the tenants in base tenure of the manor of Cheltenham, in the county of Gloucester, &c. &c. The first section—after reciting, that, within the said manor of Cheltenham, the copyholders in base tenure having customary estates of inheritance to them and their heirs in their several customary messuages and lands, many questions *and doubts* had been of late made touching their customs, many of them being so uncertain, unreasonable, and inconvenient, that it had caused many suits in law, at great expenses in money, and much loss and trouble, insomuch that in many years past the

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manor had yielded but little profits either to lords or tenants; for remedy thereof, and for avoiding of suits, and for the quieting and establishing of the estates of tenants and their posterity within the said manor—enacts, "That the descent of the said customary lands shall be from thenceforth in fee simple, according to the rules of common law." By the second section, each customary tenant was to pay 30s. in lieu of a heriot. "Saving only (section 3.), that, if any copyholders shall die without issue male, having daughters, the eldest daughter shall inherit solely, as the eldest son ought to do by the course of the common law; and that, if any of the said customary lands or tenements shall or ought, according to the course of the common law, to descend to any sisters, aunts, or female cousins, that then and in every such case the eldest sister, aunt, or female cousin, shall inherit the same lands and tenements solely and alone."

The 5th section empowers copyholders to grant jointure of their lands to their wives for life.

The 8th section enacts "That the wives of the copyholders shall from thenceforth have for dower during their lives the third part only of their husbands' customary lands; the said third part to be set forth and assigned to them by the homage of the court wherein the presentment of the death of the husband shall be presented, or within such time next after the same court as shall be limited by the stewards in that behalf: but such wives as shall thereafter accept and take a jointure of their husbands' customary lands within the said manors, by grant, limitation, or assignment, before marriage, or shall accept of such a jointure after marriage, and agree thereunto after the death of the husband, shall be concluded and barred to demand any dower of those or any customary lands of such husband within the said manor: provided always that women then living theretofore wives of any copyholders of the said manor dying tenants, and also the then wives

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of any of the copyholders of the said manors, or either of them, shall enjoy the customary lands of their then or late husbands dying tenants, for their lives, or twelve years after, as if that act had never been made."

The 9th section enacts, "That the wives of the copyholders which shall join in any grant or surrender with their husbands of any of the customary messuages or lands, being first solely and secretly examined in court according to the custom there, shall be concluded and barred afterwards to claim any right, title, or estate whatsoever, of or in those lands so surrendered and granted as aforesaid."

The 10th section declares that no husband surviving his wife shall, by fining with the lord, keep his wife's lands from the heir of the wife.

And by the 11th section, "all customs of enjoying lands by widows of customary tenants, or by after-taken husbands of such widows, or the heirs of such widow or after-taken husband, are declared to be void; and all other lawful customs and usages within the manor not repugnant and contrary to the meaning of the act are to remain good and effectual."

The case then stated that John Riddell, late of Cheltenham, who died in the month of December, 1825, was, during the time of his marriage with the plaintiff, seised of divers copyhold tenements situate within the said manor, which he held according to the custom of the said manor, and to which he had been duly admitted; and that, as to one of such copyhold tenements, being a messuage or dwelling-house situate No. 8, Still's Lane, and the appurtenances thereunto belonging, the said John Riddell, on the 4th of March, 1805, at a court then holden for the said manor, surrendered into the hands of the lord of the said manor the said messuage or tenement and appurtenances, to the use of Edward Jenner, of Cheltenham aforesaid, doctor of medicine, since deceased, and his heirs. The plaintiff

did not join in the said surrender of the said copyhold tenement to the said Edward Jenner, nor had she since joined in making nor had she made any surrender thereof.

According to the custom of the said manor, unless the wives of the copyholders of the said manor join in the surrenders made by their respective husbands during their life-times, such wives are entitled, upon the death of their husbands, to dower out of the copyhold tenements so surrendered.

The defendants, who claimed to be beneficially interested under the will of Dr. Jenner, insisted that the plaintiff was not entitled to dower out of such copyhold premises, inasmuch as they alleged that the widow of a customary tenant was not entitled to dower of any of the copyhold tenements aliened by her husband in his life-time, but of those only of which her husband died seised.

The question for the opinion of the Court was, whether, according to the custom of the manor of Cheltenham, the widow of a copyholder was entitled to dower out of customary lands of which her husband was tenant during the coverture, but of which he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been solely and secretly examined in court, or having joined in the surrender thereof.

The case came on for argument in the course of the last term.

Mr. Serjeant *Merewether*, for the plaintiff. — The plaintiff is entitled to dower out of the tenement surrendered by her husband to the use of Dr. Jenner, she not having been separately examined in court, according to the custom of the manor, or joined in the surrender. She is clearly entitled to dower under the statute 1 Car. 1; and the Court will also look at the customs of the manor before that act was passed, and

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which gave the widows of customary tenants a more extensive interest or right than they would have been entitled to at common law. As the line of descent differed, and the customs were uncertain and unreasonable, the express object of the statute was to remedy the doubts which had arisen with respect to such customs; and the first and second sections of the act carry the object and intent expressed in the preamble into effect, by enacting that the descent should thenceforth be according to the rules of common law, and that a certain and fixed sum should be payable in lieu of an heriot. The fifth section, which empowers the copyholders to grant jointures of their lands to their wives for life, is analogous to the common law principle; and the eighth clause, which is the most material, gives the widow *dower* of one third part only of her husband's customary lands; thereby limiting the more extensive interest she previously had under the custom, viz. for her life or twelve years. The act, therefore, substitutes dower at common law for any former right or claim the wife or widow of a copyholder might make or be entitled to under the custom; and the ninth section enacts that the wife may bar her right to dower, by joining in a surrender with her husband, she having been first solely and secretly examined in the manor court, according to the custom: which is analogous to the levying of a fine by a feme coverte in a Court of common law; and, by the eleventh section, all former customs, as to the enjoyment of lands by widows, &c., are declared to be void, and all other customs and usages within the manor not repugnant and contrary to the meaning of the act, were to remain good and effectual. The question then is, what is the meaning of the word *dower* as used in the statute. As the main object of the act was, to substitute the rules of common law for the uncertain and unreasonable customs which had hitherto prevailed within the manor, there can be no doubt but that the legislature meant that dower

should have reference to dower at common law, which is a well-known term, and the Court will give full effect to it; and it is essential to dower that it should attach upon all lands of which the husband was seised *during the coverture*. If a statute declare that a certain act shall be deemed and taken to amount to a felony, or to a misdemeanor, the legal consequence must necessarily follow, although it is not declared. Now, in this case, the word dower must be taken in its usual and legal sense, and cannot be understood to mean customary dower, or free bench; for, if it be so, it would have the effect of setting up the old customs which it was the object of the statute to prevent; and the 8th and 9th clauses are express to shew, that, after the passing of the act, the wives of copyholders should have the third part of their husbands' lands for dower, and that they may bar their right to it by joining their husbands in the surrender, after having been separately examined in court, according to the custom of the manor.

Mr. Serjeant *Scriven*, contra.—The object of the legislature in passing the statute 1 Car. 1, was not to destroy the original customs of the manor, but merely to regulate them: neither was it meant that dower, in its usual sense or general acceptation, at common law, should be substituted for customary dower, or free bench, which prevails in all manors and tenures in the kingdom, with the exception only of lands held in gavelkind. It is quite clear that the husband may defeat his wife's claim or right to customary dower, or free bench, by mortgage, whenever he pleases. So, if he has a license from the lord of the manor to grant a lease, it will deprive the widow of her dower. In *Benson* v. *Scott* (*a*), where a person surrendered his copyhold by way of mortgage, and died without paying off the money, leaving a widow, who claimed dower,

(*a*) 4 Mod. 251; S. C. 3 Lev. 385; 1 Salk. 185.

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the Court said, it was plain he might alien or extinguish his right; that the *free bench* grew out of the estate of the husband; and that it was his *dying seised* which gave the widow a title. In *Hinton* v. *Hinton* (*a*), it was held that even an agreement to convey would in equity bar the widow of a copyholder of her right to free bench. In *Godwin* v. *Winsmore*, Lord Chancellor Hardwicke said (*b*): "Free bench is merely a widow's estate in such lands as the husband *dies seised* of, not that he is seised of during the coverture, as dower is." In *Fareley's* case (*c*), it was decided, that, if a copyholder make a lease for years, his widow cannot avoid it without a special custom, because the lessee came in under the custom, and by the lord's license as well as the widow. In *Dugworth* v. *Radford* (*d*), it was held, that, if a copyholder grant a lease for a term of years, the estate of the widow durante viduitate is extinguished. And in *Eastcourt* v. *Weeks* (*e*), it was agreed by the Court, that, if a copyholder make a lease by license of the lord, it will defeat the wife of her free bench. The same point is laid down in Gilbert's Tenures (*f*). The rule established by these cases applies generally to all, unless there be a special custom to the contrary. The title, preamble, and recital of the act in question must be looked at, in order to collect the intent of the legislature in the passing of it. In Comyns's Digest (*g*), it is said "that the preamble is a good means for collecting the intent, and that the ground and cause of the making of a statute explains the intent." Here, the title of the act is, for the settling or confirming the customs of the manor, and not for destroying or putting an end to them; and the preamble, after reciting that doubts

(*a*) Ambler, 277; S. C. 2 Vez. 631.
(*b*) 2 Atk. 526.
(*c*) Cro. Jac. 36; S. C, Moore, 758.
(*d*) Sir Wm. Jones, 462.
(*e*) Freeman, 516.
(*f*) Page 321.
(*g*) Tit. "Parliament," R. 11.

had been raised respecting the customs, many of them being uncertain and inconvenient, states that the object of the act was the avoiding of suits in law, which had frequently arisen with respect to such customs; and not the entire abolition of such customs. It must be conceded, that, by the common law of England, the widow is entitled to dower from all lands of which her husband was seised during the coverture. But here the eighth section of the statute is most important, which enacts, that, from thenceforth, the wives of the copyholders shall have for dower during their lives the third part only of their husbands' customary lands, which part is to be set forth and assigned to them by the homage of the court wherein the presentment of the death of the husband shall be presented. The presentment is necessarily precedent to the claim for dower; and, if the husband was not tenant of the land at the time of his death, no such presentment could be made; and here the plaintiff cannot be entitled to the dower she claims out of the tenement in question, as it was aliened or surrendered by her husband in his lifetime, and of which, therefore, he did not die seised. No change as to the quality of the estate was contemplated to be effected by the statute; and all previous customs which were not repugnant or contrary to the meaning of the act, were to remain good and effectual. In cases of copyhold tenure, if customary dower or free bench be withheld, the remedy of the widow is by writ of dower (*a*); and free bench and customary dower are synonimous terms (*b*). In *Shaw* v. *Thompson* (*c*), it was resolved that the wife of a copyholder should not have dower of a copyhold, unless by special custom; and that, when a wife is to be endowed by custom of a copyhold, she should have all incidents to dower; and therefore that she should be enti-

(*a*) Kitchen on Courts, 242.
(*b*) Ibid. 200.
(*c*) 4 Rep 30 b.

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tled to recover damages by the statute of Merton, cap. 1, &c. In *Ward* v. *Ward* (*d*), Lord Hardwicke decreed that a devisor must be seised of a copyhold estate at the time of making his will, otherwise that it will not pass by it. Here, the statute does not substitute dower at common law for customary dower; and, if the legislature had intended to do so, such intention should have been expressed; and, although the act varies the custom as to the mode of descent, yet it does not alter the nature of the tenure, or destroy any of the previous customs which were not repugnant or contrary to the act. The case of *Parker* v. *Blicke* (*b*), which was decided in Hilary Term, 13 Car. I (twelve years after the statute in question was passed), is precisely in point, although not so strong as the present. That case was decided on the custom of the same manor, namely, that the wives of copyholders dying tenants of the manor, should have the lands to which their husbands were admitted, for their lives, and twelve years. These, he copyholder having become bankrupt, the commissioners bargained and sold his copyhold estate for the benefit of his creditors, and the copyholder died before the bargainee was admitted: and it was resolved that his widow was barred of her free bench, because her husband did not die tenant, for the bargain and sale took his estate from him and ousted him of the copyhold. That case, therefore, established the principle that a copyholder may defeat his wife's right to customary dower or free bench by any species of alienation: and here the plaintiff's husband had surrendered the premises in question during his lifetime; and, as he did not die seised or possessed thereof, the plaintiff, his widow, cannot be entitled to dower.

Mr. Serjeant *Merewether* in reply.—The case last cited

(*a*) Ambler, 299. (*b*) Cro. Car. 568.

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does not apply, as it was decided on the custom of the manor, and the husband must have been living when the statute 1 Car. 1 was passed, the bargain and sale by the commissioners being dated on the 5th April, 10 Car. 1. But the 11th section of the act expressly declares that all customs of enjoying lands by widows, or their after taken husbands, shall be void; and the 8th gives the wife dower of the third of her husband's lands, in lieu of her having the land for her life, and *twelve years*, according to the custom; and it is quite clear that the legislature meant she should have dower according to the common law, as it is enacted, that, from *thenceforth*, she shall have for dower during her life the third part *only* of her husband's customary lands; which not only diminishes her former interest, but substitutes another instead, and the former custom is thereby wholly avoided. Free bench, or customary dower, does not exist in every manor, for in several the right of the wife to dower is analogous to dower at common law. Neither are free bench and customary dower synonimous, for the former term is never made use of in any proceeding at law. Although the 8th section requires the death of the husband to be presented to the homage, yet, as in this case he had previously surrendered or alienéd his estate or interest in the property in question, it was subject to his wife's right to dower, which attached on his death: and it is stated in the case, that, by the custom, unless the wife joins in the surrender, she is entitled to dower on the death of her husband. If, therefore, the plaintiff is entitled to dower, as she clearly is under the statute, she is entitled to it according to the rules prescribed by the common law; and the case of *Doe* d. *Nethercote* v. *Bartle* (*a*) does not apply, as there the Court thought that the surrender was matter of substance, and that it was necessary that it should be accompanied by the separate examination of the wife.

Cur. adv. vult.

(*a*) 5 Barn. & Ald. 492.

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The following certificate was afterwards sent to the Master of the Rolls:—

"We have heard this case argued, and considered it, and we are of opinion, that, according to the custom of the manor of Cheltenham, within the county of Gloucester, and the provisions of the statute 1 Car. 1, c. i, set forth in the case, the widow of a copyholder is entitled to dower out of customary lands of which her husband was tenant during the coverture, but of which he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been solely and separately examined in court, or having joined in the surrender thereof.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET."

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By indentures of lease and release, A. mortgaged certain farms and lands to B. in fee. B., by will, after leaving an annuity charged on his real and personal estate, and other specific devises of real property, devised all his messuages or dwelling-houses, buildings, *chattels real*, ready money, *securities for money*, all debts owing, and personal estate of any nature or kind whatsoever, save what were thereinbefore otherwise disposed of, to two trustees and the survivor, their heirs, executors, administrators, and assigns, upon trust to invest so much of the property as consisted of money, in the funds or real securities, and to pay the dividends, and also the rents and profits of the last devised chattels real, to C. for life; and, after his decease, to divide the residue, or transfer the securities then subsisting for the same, unto and among the children of C. equally, share and share alike:—*Held*, that the legal estate in the premises comprised in the indentures of mortgage passed under B.'s will to the trustees therein named, by the devise of the testator's securities for money to them and their heirs; and therefore that it passed to the mortgagor, under a conveyance by the surviving trustee under the will, upon the payment of the mortgage money and interest due thereon by such mortgagor.

A CASE, of which the following is the substance, was sent by the direction of his Honour, the Vice-Chancellor, for the opinion of the Judges of this Court.

By indentures of lease and release, bearing date the 30th of April and the 1st of May, 1783, Rice Thomas, in

consideration of 1,000*l.* advanced and paid to him by Joseph Crew, released and conveyed to the latter, his *heirs* and assigns, in fee, certain lands, messuages, and farm houses, in the deeds particularly mentioned, and described as being in the occupation of three several tenants, subject to a proviso for redemption on payment of the said sum of 1,000*l.* by Thomas, with interest at the rate of five per cent. per annum. Joseph Crew died in January, 1801, leaving a will bearing date the 19th of April, 1799, duly executed and attested to pass real estates, and by which, after leaving an annuity of 20*l.* per annum to a female servant, charged on the testator's real and personal estates; and, after several specific devises of houses and premises at Chester, and bequests of pecuniary legacies, the testator gave and devised as follows:—"And as to, for, and concerning all my messuages or dwelling-houses, buildings, *chattels real*, ready money, *securities for money*, and all debts to me due and owing at the time of my decease, and personal estate of any nature or kind whatsoever, save and except what are hereinbefore otherwise disposed of, I give and devise to William Currie and Richard Mytton, and the survivor of them, their *heirs*, executors, administrators, and assigns, and the heirs, &c., of such survivor, upon trust as follows—first, that they the said William Currie and Richard Mytton, or the survivor of them, of their own authority, shall lay out or invest in the public funds or government stock, or on real securities to be approved of by them, so much of my property as shall consist of money, in their joint names, at interest; and, secondly, upon this further trust, that they the said William Currie and Richard Mytton, and the survivor of them, do and shall pay the dividends and produce of the monies so laid out or invested by them, and also the rents, issues, and profits of the said messuages, *chattels real*, &c., &c., last devised, to John Capper, for the term of his natural life, and immediately after

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his decease, to pay and divide the residue, or transfer the securities then subsisting for the same, unto and amongst the children of the said John Capper, equally, share and share alike:" and the testator appointed Currie and Mytton sole executors of his will.

Mytton died in 1802; and, on the 24th of May, 1803, Rice Thomas, the mortgagor, paid to Currie, the surviving trustee under Crew's will, the above sum of 1000*l.*, with all interest due thereon, as secured by the deeds of April and May, 1783, upon which Currie executed a conveyance of the mortgaged premises to Rice Thomas, in fee. The case then stated that the said Joseph Crew, the testator, was illegitimate, and died without leaving any lawful issue; and that, by an order of the Vice Chancellor, bearing date the 1st of June, 1831, a trustee was appointed to re-convey to the said Rice Thomas the premises conveyed by the indentures of lease and release of the 30th of April and 1st of May, 1783, under the provisions of an act of parliament (*a*) passed in the first year of the reign of his present Majesty, c. 60, intituled, "An act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling Courts of equity to give effect to their decrees and orders in certain cases;" and that the trustee re-conveyed the premises accordingly.

The questions for the opinion of the Court were—first, whether the legal estate in the said premises comprised in the said indentures of mortgage of the 30th of April and 1st of May, 1783, passed under the will of the said Joseph Crew to the said William Currie and Richard Mytton, and the survivor of them, and, therefore, passed to Rice Thomas under the deed of re-conveyance of the 24th of May, 1803—secondly, if the said premises did not pass under the said will, whether the legal estate

(*a*) Sir E. B. Sugden's Act.

in them passed to Thomas under the re-conveyance executed by the trustee in pursuance of the said order of the Vice-Chancellor.

Rice Thomas having entered into a contract to sell the premises in question, the purchaser raised an objection to his title, upon which Thomas presented a petition to the Vice-Chancellor praying that the premises might be re-conveyed to him; upon which his Honour directed a trustee, as stated in the case, to be appointed, who re-conveyed the premises accordingly: but, as it was afterwards insisted that the legal estate in the mortgaged premises did not pass to the trustees under Crew's will, on the authority of *Galliers* v. *Moss* (*a*), his Honour directed the above case to be submitted to the Judges of this Court for their opinion.

The case came on for argument in the last term.

Mr. Serjeant *Stephen*, for the vendor.—If the legal estate in the premises in question did not pass to Crew's trustees and executors under his will, it is quite clear that it passed to Rice Thomas, the mortgagor, under the conveyance executed by the trustee in pursuance of the order of the Vice-Chancellor. The statute 11 Geo. 4 & 1 Will. 4, c. 60, repeals the acts of 6 Geo. 4, c. 74, and 7 Geo. 4, c. 43, except so far as they relate to stock belonging beneficially to infants or lunatics, &c., and the 8th section of the 1 Will. 4, enacts that, "where any person seised of any land upon any trust, shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid be living or dead, or, if known to be dead, *it shall not be known who is his heir;* or, if any trustee seised

(*a*) 9 Barn. & Cress. 267.

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as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same—then, and in every or any such case, it shall be lawful for the said Court of Chancery to direct any person whom such Court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said Court shall think proper; and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had made and executed the same. Here, it appears that Crew, the testator, died without issue; and, as it was not known who his heir was, the case falls within the meaning and equity of the act, and the mischief it was intended to remedy. Besides, the testator being illegitimate, he could have no heir-at-law; and the well-known maxim applies, that "de non apparentibus et non existentibus eadem est ratio" (*a*). Things that do not appear, must be considered as if they did not exist; and the converse equally holds. The words of a statute may be enlarged or extended, as in *Eyston* v. *Studd*, where it is said (*b*): "When the words of a statute enact one thing, they enact all other things which are in the like degree; as, the statute 9 Edward, c. 3, which ordains that, in an action of debt against executors, he who comes first by distress shall answer, is extended by equity to administrators; and such of them as comes first by distress shall answer, by the equity of the said statute, quia sunt in æquali genere. And, in order to form a right judgment when the letter of a statute is restrained and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law maker is present, and that you have asked him

(*a*) *Caudrey's* case, 5 Rep. v. b. (*b*) 2 Plowd. 467.

the question you want to know touching the equity; then you must give yourself such an answer as you imagine he would have done if he had been present." The statute therefore must be taken to apply to all cases where the heir is not known as well as where there is no heir; and the maxim applies, "æquitas est verborum legis directio efficacius cum una res solummodo legis cavetur verbis, ut omnis alia in æquali genere, eisdum cavetur verbis;" and, as there was no legal heir, the conveyance by the trustee under the order of the Vice-Chancellor is within the equity of the statute. [Lord Chief Justice *Tindal*.—As Crew, the testator, was illegitimate, and died without lawful issue, did not his estate vest in the Crown, for want of an heir?] The Court will not inquire whether or not Crew was illegitimate, as the Crown have not interfered; and the only persons before the Court are the parties to this suit.

If, however, the Court should be of opinion that the legal estate in the premises in question did not pass by the conveyance by the trustee under the Vice-Chancellor's order, it passed to the trustees and executors under the testator's will, by the devise of "*all his securities for money*." Although, in the late case of *Galliers* v. *Moss*, it was decided that the legal estate in mortgaged property did not pass under the residuary clause of a will, by the words *securities for money*, yet the ground of the decision in that case is not satisfactory; and even if it were, it is distinguishable from the present: as here the devise of the securities was to the trustees and *their heirs* for certain purposes declared and expressed by the testator; and, on *Ex parte Morgan* (*a*) being referred to in *Galliers* v. *Moss*, Mr. Justice J. Parke observed (*b*)—"There, the context shewed that the real estate intended to pass, was that on which the annuity could be charged; here the *heir* of the surviving trustee is directed to get in the securities for money; must not effect be given to that

(*a*) 10 Ves. 101. (*b*) 9 Barn. & Cress. 277.

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word?" Besides, in *Galliers* v. *Moss*, there were two clauses in the will, and upon which the decision of the Court mainly turned; for, as Mr. Justice Bayley said, in delivering judgment (*a*): "The one which conveyed the property which was the subject of that clause, contained words sufficiently large to have included it, but it conveyed it afterwards to trustees for the use of certain persons in strict settlements, and with a great variety of peculiar limitations which were not properly applicable to mortgage property; and, by the residuary clause by which the testator gave all his money, goods, and *securities for money*, there were no words of inheritance applicable to the bequest; but there was a word of inheritance applied as to the manner in which the property was to be disposed of." There, the testator gave the property mentioned in the residuary clause to trustees and their *executors*, upon trust that they *or* their heirs should *sell*, and in the earlier clause the property was given to the trustees and their *heirs*; the Court, therefore, came to the conclusion, that the mortgage property did not pass under the first clause, because the subject of the devise was limited to uses not applicable to mortgage property; and that it did not pass under the latter clause, because the words there used were not adequate to the passing of such property. The general current of authorities shews that a mortgaged estate or lands will pass in a devise under the words "securities for money," independently of the case of *Crips* v. *Grysil* (*b*), where it was held, that, under the words "all my mortgages," the devisee took lands mortgaged in fee to the testator; and, although in *Galliers* v. *Moss*, the Court had the record of the special verdict in *Crips* v. *Grysil* before them, yet they merely expressed an opinion that that case was not an authority to shew that the words "securities for money," when limited to *executors*, and when there is nothing else in the

(*a*) 9 Barn. & Cress. 280. (*b*) Cro. Car. 37.

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will to shew any intention on the part of the testator to pass freehold property, were adequate to pass freehold estate. Here, the intention of the testator must be looked at; from which it is obvious that he meant the legal estate in the mortgaged premises to pass to the trustees under the words *securities for money;* and although in *Sylvester* v. *Jarman* (*a*), where the testator (a mortgagee) devised to J. B. and his heirs all the rest and residue of his freehold, leasehold, and copyhold estates, together with all his goods and chattels, monies, bonds, *mortgages*, and debts, which might be owing to him at the time of his decease, and appointed J. B. his executor; it was held that he had not thereby devised the legal estate in the mortgaged premises; yet the word *mortgages* has, in itself, an ambiguous and equivocal meaning, and may apply either to the mortgage debt or the lands mortgaged. So, the word *securities* may be taken to refer to the deeds or instruments by which the lands are conveyed to the mortgagee, and not to the lands themselves. Besides, the principle on which *Sylvester* v. *Jarman* was decided, was, that, although the words of the devise, *per se*, would have been sufficient to convey the legal estate in the mortgaged premises, yet, as they were qualified by other words subjecting the property devised to *payment of debts*, &c., which was a purpose to which the legal estate of the mortgagee was not applicable, it shewed that it was not the intention of the testator that it should pass. The cases of *Ex parte Whitacre* (*b*), and *Renvoize* v. *Cooper* (*c*) were not referred to or noticed by the Court in *Galliers* v. *Moss;* and in *Renvoize* v. *Cooper*, the Vice-Chancellor said: "I am of opinion that the mortgaged fee will pass by the gift of mortgages and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property; and a

(*a*) 10 Price, 76. (*b*) 1 Sanders on Uses, 3rd edit. 285.
(*c*) 6 Madd. & Geld. 371.

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gift of a mortgage security for money, is a gift of all the testator's interest in the money and security, and will therefore pass the fee." In *Silberschildt* v. *Schiott* (*a*), Sir William Grant said: "There is no doubt a gift of mortgage money would have carried the mortgagee's interest in the land upon which it was secured." In *Ex parte Tyers* (*b*), where a testator (a mortgagee) devised certain houses, messuages, &c. &c., and other securities for money, and all the residue of his personal estate, to three persons, their heirs, executors, &c., upon trust to sell the estates and convey them to the purchasers, the Vice-Chancellor held that the words "securities for money" were sufficient to pass lands in mortgage, although they were associated with other words relating to personal property. In *Lord Braybroke* v. *Inskip* (*c*), where all the cases upon this subject were reviewed by Lord Eldon, he decided that trust and mortgaged estates would pass under general words in a will passing other estates, unless a contrary intention could be collected or inferred from expressions used by the testator, or from purposes or limitations to which he had subjected the lands devised; and his Lordship there said (*d*)—"I know no case which states as the rule that trust estates shall not pass under general words, unless an intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass." As, therefore, in this case, there is nothing to shew that the testator did not mean that the mortgaged premises should not pass to the trustees under the words "securities for money" in the residuary clause of the will, and as the devise was to them and their heirs generally, and not limited to the executors upon trust to be discharged by them or

(*a*) 3 Ves. & Bea. 49.
(*b*) Not reported.
(*c*) 8 Ves. 417.
(*d*) 8 Ves. 435.

their heirs, the case of *Galliers* v. *Moss* is not only distinguishable from, but does not bear on the present. The duties and character of the heir or executor of a trustee are altogether different. Here, the words "securities for money" follow those of *chattels real*, which must be taken to apply to the mortgaged premises, the legal estate in which passed to the trustees, and consequently passed to the mortgagor under the conveyance by the surviving trustee in May, 1803; and although, in *Doe* d. *Spearing* v. *Buckner* (*a*), it was held that a freehold house did not pass to trustees under a residuary clause by which the testator gave them all the rest of his estate and effects, and the introductory clause contained the general words "as to all his estate and effects, both real and personal;" yet there the limitation was to the trustees and their *executors*, and not to the *heirs* of the trustees, as in the will in question.

Mr. Serjeant *Coleridge*, contra.—The first question is, whether the legal estate in the mortgaged premises passed under the reconveyance executed by the trustee in pursuance of the order of the Vice-Chancellor. [The learned Serjeant was stopped by the Court, who said that they were of opinion that the statute 11 Geo. 4 & 1 W. 4, c. 60, did not apply; and they requested him to confine his argument to the point whether the legal estate passed to the trustees under the testator's will.]—The case of *Galliers* v. *Moss* is not only in point, but the principles there established are consistent with all the antecedent authorities. Admitting that the legal and beneficial estate and interest in mortgaged lands may pass by general words in a will, if there be no intent expressed by the testator to limit them; yet, the question here is, whether there are apt and sufficient words in the will to convey the mortgaged premises to the trustees therein named. The

(*a*) 6 Term Rep. 610.

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mortgaged property consisted of farms in the occupation of several persons, and the annuity was charged on the testator's real and personal estate. It is quite clear that the mortgaged lands did not pass under the words, "messuages or dwelling-houses." But it has been said that the legal estate passed under the words, "securities for money." The Court will not, however, presume that it was the intention of the testator that it should so pass; and the rule noscitur a sociis applies, from which it is manifest that the testator meant that the securities for money were to apply to personal securities only. It has been said that lands in mortgage will pass under the words "mortgages," on the authority of *Crips* v. *Grysil;* and that the words "securities for money" are far stronger: but it appears that that case was decided without argument, and was in effect overruled in *Wilkinson* v. *Merryland* (*a*), where the Court doubted whether an estate in mortgage passed to the devisee, because the word mortgage was coupled with personal things, viz. goods, chattels, leases, estates, debts, &c.: but they agreed, that, if the testator had devised all his estate in the land, or had mentioned that he had such land mortgaged in fee, and devised his mortgage, the fee would have passed. Besides, in *Crips* v. *Grysil* the words were, "mortgages or *specialties* for money," which are far stronger than "securities for money;" and, as Mr. Justice Bayley observed in *Galliers* v. *Moss*, it appeared on reference to the record, that the testator had not only made his legatee his executor, *but also the heir of his freehold* (*b*). In *Noys* v. *Mordaunt* (*c*), where a testator, having a mortgage in fee upon lands in F., devised to his two daughters and their heirs his lands in F., upon which he had entered on forfeiture of the mortgage, the Court said, that, although it was a mortgage as between the mortgagor and mortgagee, yet the testator's intent was, that it should pass to his daugh-

(*a*) 4 Cro. Car. 447, 449. (*b*) 9 Barn. & Cress. 282-3. (*c*) 2 Vern. 582.

ters as real estate, and not as part of his personal estate. In *Sylvester* v. *Jarman*, the Lord Chief Baron held that the legal estate in mortgaged premises did not pass under the word "mortgages," as it was inconsistent with the trusts of the will; and that, in order to pass mortgage property, there must be either words sufficient to pass it, or the property must not be limited to uses inapplicable to mortgage property. The words "securities for money" are as ambiguous as the term mortgage; for, bonds, bills, notes, and instruments of a like nature are clearly securities for money; and here the ultimate trust is expressed to be to *transfer the securities then subsisting* to and among Capper's children, which is altogether inapplicable to mortgaged lands. The case, therefore, falls within the first principle established in *Galliers* v. *Moss*. Although, in *Lord Braybroke* v. *Inskip*, Lord Eldon decided that a mortgaged estate might pass under general words in a will passing other estates, yet here there are no such general words, and no intention of the testator can be collected that he meant the mortgaged premises to pass; besides which, it is inconsistent with the trusts declared by the will. In *Ex parte Whitacre*, the words "securities for money" were coupled with "lands and hereditaments," which were introduced at the commencement of the clause, and from which it was apparent that the testator meant to convey the whole of his estate. So, in *Renvoize* v. *Cooper* (*a*), the word "*estates*" preceded the word "*mortgages*," and they were not subjected to any charge. The dictum of Sir William Grant in *Silberschildt* v. *Schiott* (*b*), that a gift of the money would carry the mortgagee's interest in the land on which it was secured, is extrajudicial, as the decision turned entirely on the intention expressed by the testator. Here, however, the Court will look at the collocation of the words "securities for money," and, as they

(*a*) 6 Madd. 372. (*b*) 3 Ves. & Bea. 49.

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follow those of "ready money" and precede "debts owing to the testator," and all his *personal* estate not otherwise disposed of was to be subject to the same trusts, namely, "that so much of his property as consisted of money should be invested in the funds or real securities, and that the dividends and produce, and also the rents, issues, and profits of his said last devised chattels real, should be paid to Capper during his life, and after his decease the residue should be divided or the subsisting securities transferred to his children," and the annuity was before charged on the testator's real estate, it is quite clear that he did not mean to include the mortgaged estates in the devise to the trustees: and the principle on which *Sylvester* v. *Jarman* was decided was, that although the words of the devise were large enough to include a mortgaged estate, yet that it did not pass, because the testator had devised the property subject to the payment of his debts, &c., which was an object to which the legal estate in mortgaged premises could not be applied; neither could it be applied for a special purpose, namely, the sale of his estates, and the division of the produce among his children. In *Wall* v. *Bright*, the Master of the Rolls said (*a*): "The way of reasoning with respect to trust estates has been this, that, the party having no beneficial interest, it can hardly be considered his for purposes of disposition; and to treat it as his own would be quite inconsistent with its nature. He has no right to dispose of it, except by the direction of his cestui que trust, or for the objects for which it is confided to him. Where the devise is not consistent with the trust, to suppose he meant it to pass is to suppose that he was taking upon himself to do an act of injustice: this the Court will not presume, and therefore says that he did not intend to include it." Although it is said, that, as the word "heirs" in this case is

(*a*) 1 Jac. & Walk. 500.

introduced in the limitation to the trustees, it gives them an estate of inheritance; yet that word may have a definite meaning, and be taken to apply to other freehold property, or to leaseholds, which might pass to the heirs as special occupants: and as that word is omitted in the trust it may fairly be assumed that it was used inadvertently, particularly as all the trusts might be executed by the trustees or the survivor, as if that word had not been introduced. Looking, therefore, at the situation in which the words "securities for money" are placed, namely, as being associated with words that are descriptive of personal estate only (and those of "messuages and buildings" must be considered as applying to leasehold messuages, which are referred to in the trust as the testator's last devised chattels real), and as the trusts are inconsistent with, and were inapplicable to mortgaged property, this case falls expressly within the principles established in *Galliers* v. *Moss*, which is the last decision on this subject: and Mr. Justice Bayley, in delivering the judgment of the Court, said (*a*): "The general rule with respect to mortgaged property, to be collected from *Doe* v. *Reade* (*b*), *Lord Braybrooke* v. *Inskip*, and *Sylvester* v. *Jarman*, is this; in the first place there must be words sufficient in order to pass the mortgaged property; in the next place, the property must not be limited to uses inapplicable to mortgage property." That is the true principle; and, as the Court there disposed of the authority of the case of *Crips* v. *Grysil*, which was mainly relied on to shew that mortgaged property would pass under the words "mortgages or securities for money," it is clear that the legal estate in the premises in question did not pass to the trustees under the will.

Mr. Serjeant *Stephen*, in reply.—Although mortgaged

(*a*) 9 Barn. & Cress. 281. (*b*) 8 Term Rep. 118.

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lands might not pass under the words "messuages or dwelling-houses," yet, taking the whole of the words of the residuary clause together, it is clear that the testator meant that the lands of which he was mortgagee in fee, should pass to the trustees named in the will. Although it has been said that *Crips* v. *Grysil* was over-ruled by *Wilkinson* v. *Merryland*, yet, when that case first came before the Court, the only question was, whether the fee passed to the testator's wife; and it was held that she had only an estate for life, as he merely devised his estates to her, without any limitation, after payment of his debts: and that was the ground of the ultimate decision, although the Court entertained a doubt whether an estate in mortgage passed to the wife, the testator having used the words "all the estates, mortgages, &c., whereof he was possessed." In *Noys* v. *Mordaunt* (*a*), the testator devised his lands in F., upon which he had entered upon forfeiture of the mortgage, to his two daughters and their heirs; and, as the estate was mentioned by name, it is clear that the testator meant that it should pass as part of his real estate. In *Sylvester* v. *Jarman*, there was a charge on the lands devised; and it was admitted that the words of the devise were of themselves sufficient to convey the legal estate in the mortgaged premises. The words "securities for money" have a more unequivocal meaning than the term "mortgage," which may be taken to apply only to the money secured; whilst here it is more than probable that the meaning of the testator was, to pass the lands conveyed to him by way of mortgage to his trustees; and the Court will carry that intent into effect unless a contrary intention be shewn; and it is incumbent on a party who seeks to limit the general words of a will to establish such limited construction. By a mortgage deed the legal estate of the mortgagor passes to the mortgagee; and, as a mortgage

(*a*) 2 Vern. 582.

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is a charge upon the land, whatever will give the money will carry the estate with it. Besides, here, by the terms of the ultimate trust, the trustees were to pay the rents, &c., of the testator's chattels real to Capper for life, and after his death to divide the residue among his children; and such division could not be made unless the estate in mortgage passed to the trustees. They were clothed with the right either to call in the money due from the mortgagor, or to convey the mortgaged estate for the purpose of dividing the residue as directed by the testator; and, as there was no charge on the mortgaged property, the legal estate passed to the trustees, particularly as the devise was to them and their heirs. The Court will not presume that that word was introduced by mistake; and in *Galliers* v. *Moss*, the Court thought that word to be most material, and on it the judgment mainly depended.

Cur. adv. vult.

The following certificate was afterwards sent:—

"We have heard this case argued by counsel, and considered it, and we are of opinion that the legal estate in the premises comprised in the indenture of mortgage of the 1st day of May, 1783, passed under the will of Joseph Crew to William Currie and Richard Mytton, and the survivor of them, by the devise of the testator's securities for money to the said William Currie and Richard Mytton, their heirs, executors, administrators, and assigns; and therefore passed under the indenture of the 24th of May, 1803.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET."

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Tuesday, Nov. 5th.

The plaintiff was robbed of bank-notes to a large amount at a public meeting. The loss was duly advertized, and payment of the notes stopped at the Bank. Nearly two years afterwards one of the notes (for 200*l.*) was traced to the defendant, who was unable to give any account as to the manner in which he became possessed of it, except that he believed he had received it from a stranger on the settlement of a bet on the Derby stakes:—*Held*, that the plaintiff was entitled to recover the value of the note, in trover; and that his imprudence in going to a public meeting with so large a sum of money on his person afforded no excuse for the subsequent negligence and want of proper caution on the part of the defendant, in taking a note of that amount from a stranger, without due inquiry.

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THIS was an action of trover brought by the plaintiff to recover from the defendant 200*l.*, the value of a Bank of England note which had been stolen from the plaintiff under the circumstances hereafter stated, and traced to the possession (unaccounted for) of the defendant. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Guildhall after the last term. The facts were as follow:—

In the month of September, 1830, the plaintiff accompanied by a friend, went to a place called the Rotunda, in the Blackfriars' Road (a place of small repute, where meetings of no very respectable character were occasionally held), to hear a lecture on political economy. The plaintiff had in his pocket 580*l.*, including the bank-note in question; of which sum, notwithstanding the precaution he used of placing his hand upon his pocket (a precaution the character of the audience seemed to demand), he was robbed on his way out of the lecture room. The plaintiff immediately caused payment of the notes to be stopped at the Bank, and hand-bills and advertizements to be circulated, giving notice of the robbery and describing the notes. The note in question was ultimately discovered to have been paid into the Bank of England in October, 1832, by a gentleman named Allen, who stated that he had received it from the defendant in the month of May preceding. On application being made to the defendant, he professed himself to be unable to give any account of the manner in which it had come to his hands, further than that he imagined he had received it in payment of a bet upon the last Derby stakes.

On the part of the defendant, it was submitted that the plaintiff, having been instrumental to his own loss in imprudently going to such a place as the Rotunda with so

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large a sum of money in his possession, had not made out a case to entitle him to call upon the defendant to shew how the note came to his hands.

The Lord Chief Justice left it to the jury to consider—first, as to the identity of the note—secondly, whether the conduct of the plaintiff on the occasion of the loss had been so imprudent and negligent that the loss might be said to be imputable to his want of conduct, and whether he had duly given notice of the robbery—thirdly, whether the defendant had been guilty of negligence in receiving a note of so large a value without due inquiry. The jury returned a verdict for the plaintiff.

Mr. Serjeant *Andrews*, on a former day in this term, moved that this verdict might be set aside and a new trial had, on the grounds urged at the trial.—He submitted, that, considering the nature of the transactions in which the defendant was known to be engaged, no negligence or want of due caution was imputable to him; for that the same care and circumspection in ascertaining from whom he received monies could not be expected from one so engaged, as would be required of a banker. He relied on the case of *Snow* v. *Sadler* (*a*), where it was held that a party taking a bank-note in payment of a bet from a stranger on a race course, is not bound to use the same degree of caution as would be requisite if the note were taken by a tradesman.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

I have shewn to my learned Brothers my note of what passed at the trial of this cause, and they concur with me in thinking that there is no ground for this application.

(*a*) 11 J. B. Moore, 506; S. C. 3 Bing. 610.

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The defence rested on three grounds. The first ground was, that the identity of the note traced to the defendant in May, 1832, with that stolen from the plaintiff in September, 1830, was not sufficiently ascertained. That point, however, was submitted to the jury upon evidence which we consider to be sufficiently clear. It remains, therefore, for us to consider the other two grounds urged. —The first of these was, that it appears from the evidence that the plaintiff was himself instrumental to the loss he has sustained, by means of his own negligent and imprudent conduct. As to that point, undoubtedly, where a party has himself been instrumental to the injury of which he complains, that affords an answer to the action; as, in the case of a collision with the ship or the carriage of the plaintiff, the plaintiff cannot come into Court if the accident have arisen from his own improper conduct or want of care or skill. But here the plaintiff cannot be said to have been in any way instrumental to his own loss. It is said that he was guilty of culpable negligence in going to a numerous meeting with so large an amount of property on his person. Certainly, no one can say that this was a very prudent act. But what we are to inquire into is, whether the plaintiff's so losing the note in question confers a title on the present defendant. Now, the defendant was proved to have received the note without due care in ascertaining from whom he took it. I cannot see how the negligence of the plaintiff in relation to the loss of the note can at all interfere with, or excuse or alter the effect of, the defendant's negligence in thus taking it. If, indeed, the plaintiff had been guilty of negligence in not duly advertizing and giving notice of the robbery, that might give the defendant an opportunity of shewing that he had fairly and honestly acquired the note. But it appears to me that the defendant cannot set up the prior negligence of the plaintiff, in order to excuse his own.— The remaining question is, whether the defendant exer-

cised due caution in taking the note. The note was traced to the defendant. The person to whom the defendant paid it knew from whom he had received it; but, when the defendant was applied to, he denied all knowledge of the individual from whom he had taken it. This, in the case of a note of so large a value, was clearly not exercising that degree of diligence and circumspection which the law requires. In all the later cases, from *Gill* v. *Cubit* (*a*) to the present time, the decisions have turned, not on the question of the bona or mala fides of the receipt of the note, but on the degree of diligence or negligence that has been exercised by the party receiving it; and we think that the proper ground. In *Snow* v. *Peacock* (*b*), a bank-note for 500*l.* was stolen from a servant of the plaintiffs. The fact of the robbery was advertized in the Hue and Cry Gazette, and in another paper. Some time afterwards, the note was received at the banking-house of the defendants in the country, where it had been presented for change by a stranger, of whom no questions were asked as to the manner in which he became possessed of it. In trover to recover the value, the Judge left it to the jury to say whether or not due notice of the robbery had been given by the plaintiffs, and whether or not, under the circumstances, due caution had been observed by the defen-

(*a*) 3 Barn. & Cress. 466. In that case, a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose features were known, but whose name was unknown to the broker, and the latter being satisfied with the name of the acceptor discounted the bill, according to his usual practice, without making any inquiry of the person who brought it. It was held, that, in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and the jury having found for the defendant, the Court refused to disturb the verdict.

(*b*) 11 J. B. Moore, 286; S. C. 3 Bing. 406.

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dants in taking the note. The jury thought that the defendants had not exercised due caution, and accordingly found for the plaintiffs; and the Court held that this direction was proper, and refused to disturb the verdict. There, the bankers were held liable to refund the amount of the note, because they did not shew that they had exercised due diligence and discretion in taking it from a stranger, under circumstances which ought to have excited suspicion in the mind of every prudent person. In the present case, the defendant has not shewn us that he is in a situation to be entitled to receive at the hands of the Court a greater degree of favour than is usually shewn to bankers and persons of that description; no evidence was produced on his part of any dealing by him which ought to give him a greater latitude than any other person. We therefore think that the principle established in *Gill* v. *Cubit*, and recognized and confirmed in *Snow* v. *Peacock*, ought to prevail. The case of *Snow* v. *Sadler* has been relied on for the defendant, as shewing that the same degree of care and caution are not to be required in transactions of the nature here suggested, viz. the settling of bets on a race-course, as in the ordinary concerns of commerce. But the principal ground upon which the Court there yielded to the application was, that the note was for a small sum—30*l.* only. The amount of the note has always, from the time of *Miller* v. *Race* (*a*), had a preponderating influence upon the decision of the Court. Lord Manfield there says: "If it had been a note for 1,000*l.*, it might have been suspicious; but *this was a small note*, for 21*l.* 10*s.* only, and money given in exchange for it." It appears to us to be consonant with reason and good sense that greater care should be required where the note is of large amount than in the case of the smaller notes that are in ordinary circulation. Here, the jury have expressly

(*a*) 1 Burr. 452.

found that the defendant was guilty of negligence and want of due care and caution in the receipt of the note; and that finding was warranted by the evidence. We therefore think that there should be no rule.

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Rule refused (*a*).

(*a*) See *Strange* v. *Wigney*, 4 Moore & Payne, 470; S. C. 6 Bing. 677; *Down* v. *Halling*, 4 Barn & Cress. 330; and *De La Chaumette* v. *The Bank of England*, 9 Barn. & Cress. 208; 2 Barn. & Adolph. 385.

ROBERT WILLIAMS, Esq., Chairman of the Hope Assurance Company, *v.* BEAUMONT.

Friday, Nov. 8th.

CASE for a libel reflecting upon the character and trade of the Hope Assurance Company. The declaration stated that the defendant was attached to answer the above-named Robert Williams (the nominal plaintiff in this suit for and on behalf of the said Hope Assurance Company, according to the form of the statute in such case made and provided) of a plea of trespass on the case, a memorial of the names of the several persons being members of which said Hope Assurance Company, in the form expressed in the schedule to the said statute annexed was inrolled upon oath in the High Court of Chancery within thirty days after the passing of the said act, to wit, on the 30th July, 1813, pursuant to the directions of the said act, to wit, at &c. afore-

An act of parliament by which an insurance company was incorporated—after reciting that "difficulties had arisen, and might from time to time thereafter arise, as well in bringing and maintaining actions and suits *for recovering debts and enforcing obligations due to the said society*, and in prosecuting persons who might steal or embezzle any money, goods, or effects of or belonging to the said society, &c., by reason of its being required by law that all the several subscribers or proprietors should sue and prosecute by their several and distinct names and descriptions"—enacted "that all actions and suits commenced or instituted by or on behalf of the said society, *for recovering any debts, or enforcing any claims or demands now due or which might thereafter become due or arise to the said society*, &c., should be commenced or instituted and prosecuted in the name of the chairman or secretary of the said society as the nominal plaintiff:—*Held*, that this enactment empowered the chairman to sue on behalf of the company, to recover damages for a libel reflecting upon the trading character of the company.

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said; and the said defendant being so attached as aforesaid, the said plaintiff, by E. A. W., his attorney, complained—For that whereas, before the time of committing the grievances by the defendant as hereinafter mentioned, to wit, on &c., a certain policy of assurance had been effected with the said Hope Assurance Company by Sir S. B. Morland, Bart., and Sir G. Duckett, Bart., trustees of the Provident Life Office, on the life of one J. Stevenson, for the sum of 5,000*l.* payable by the said Hope Assurance Company to the said trustees, their executors, administrators, or assigns, in the manner and on the conditions and out of the funds in the said policy of assurance mentioned, to wit, at &c. aforesaid: And whereas in and by the said policy of assurance it was, amongst other things, agreed between the respective parties thereto, that, if the said J. Stevenson were not in good health at the time of effecting the said policy, or if he had before the said time of effecting the said policy laboured under any disease which tends to shorten life, then and in such case the said policy of assurance should be void: And whereas, before the committing of the grievances hereinafter mentioned by the now defendant, the said Sir G. Duckett, Bart., had exhibited his bill in his Majesty's Court of Exchequer of Pleas against Robert Williams aforesaid, to recover the sum of 5,000*l.* by the said Sir G. Duckett alleged to be due on the said policy; which said cause came on to be tried and was tried before the committing of the said grievances by the defendant as hereinafter mentioned, to wit, on &c., at &c.: And whereas, before the said action at the suit of the said Sir G. Duckett was commenced, to wit, on &c., the said Hope Assurance Company offered to the said Sir G. Duckett to refer the said claim to arbitration, which said offer he the said Sir G. Duckett did not accept, to wit, at &c.: And whereas the said Hope Assurance Company, at the trial of the said cause, resisted the said claim of 5,000*l.*, on the grounds that the said J. Stevenson was not

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in good health at the time of effecting the said policy of assurance, and also that the said J. Stevenson was at the said time of effecting the said policy labouring under a disease which tended to shorten life, and also that the said J. Stevenson fraudulently concealed from the said Hope Assurance Company at the said time of effecting the said policy certain facts material to be known by the said Hope Assurance Company, to enable the said company to form a correct judgment respecting the state of health of the said J. Stevenson, to wit, at &c. aforesaid: And whereas, before the said time of committing the said grievances by the defendant as hereinafter mentioned, the said Hope Assurance Company exercised and carried on, and still doth exercise and carry on the business of effecting assurances on lives, to wit, at &c. aforesaid: And whereas also the said Hope Assurance Company hath never at any time before or since the committing of the said grievances by the defendant, relinquished one half or any part of the said business of effecting assurances on lives: And whereas the said Hope Assurance Company, before the time of committing the said grievances by the defendant, did from time to time frame and issue certain forms of proposals, conditions, and policies of assurance, and of declarations to be made by the persons effecting insurances with the said Hope Assurance Company, which said proposals, conditions, declarations, and policies were, according to the course of business of the said Hope Assurance Company, adopted and acted upon by divers persons effecting assurances as aforesaid: And whereas the said proposals, conditions, declarations, and policies were framed in a fair, honest, and accustomed manner, and not with the intent of deceiving the persons aforesaid, or any other persons: And whereas the said Hope Assurance Company, before the committing of the said grievances by the defendant, had long exercised and carried on, and still exercise and carry on the said business of assurance on lives, and has not

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been guilty, or until the time of committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct as hereinafter stated to have been charged upon and imputed to the said Hope Assurance Company by the defendant: By means of which premises the said Hope Assurance Company, before the committing of the several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of good and worthy subjects of this realm, and was daily and honestly acquiring great gains and profits in its aforesaid business, to wit, at &c. aforesaid: Yet the defendant, well knowing the premises, but contriving and maliciously and fraudulently intending to injure the said Hope Assurance Company in its good name, fame, and credit, and to bring it into public scandal, infamy and disgrace with and amongst good and worthy subjects of this realm, and to cause it to be suspected and believed by those subjects that the said policy and other the policies of the said Hope Assurance Company, and also the proposals, conditions, and declarations framed and issued by the said company as aforesaid, were craftily and deceitfully framed by the said company in such manner and form as that the assurances should be avoided by the said Hope Assurance Company if the life or lives assured had before the time of the effecting an insurance with the said company suffered any temporary ailment, although the same life or lives assured might have theretofore been perfectly cured thereof; and also falsely and maliciously intending to cause it to be believed that the said proposals, conditions, declarations, and policies were deceitfully framed by the said Hope Hope Assurance Company with intent to have a different effect in law from that which the person so adopting and executing the said instruments as aforesaid might and would reasonably suppose them to have; and also contriving and maliciously and fraudulently intending to cause it

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to be suspected and believed that the said claim of 5,000*l.* was at the said trial of the aforesaid cause successfully resisted by the said Hope Assurance Company upon the unsupported evidence of one foreign witness; and also that the said Hope Assurance Company had resisted the said claim of 5,000*l.* in a vexatious and litigious manner; and also that the said Hope Assurance Company had at the said time of the committing of the said grievances hereinafter mentioned, given up and relinquished a large part, to wit, one half of the said business of effecting assurances on lives; and also that the said Hope Assurance Company had been and was guilty of the offences and misconduct hereinafter stated to have been charged upon and imputed to the said Hope Assurance Company by the defendant, and to vex, harrass, impoverish, and wholly ruin the said Hope Assurance Company in its aforesaid business, and otherwise—heretofore, to wit, on &c., at &c. aforesaid, in a certain newspaper called The Morning Chronicle, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the said Hope Assurance Company, and of and concerning the said Hope Assurance Company in its aforesaid business, and of and concerning the said policy, and of and concerning the said cause so tried as aforesaid, and of and concerning the conduct of the said cause by the said Hope Assurance Company, a certain false, scandalous, malicious, and defamatory libel containing the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said Hope Assurance Company, and of and concerning the said Hope Assurance Company in its aforesaid business, and of and concerning the said cause so tried as aforesaid, and of and concerning the conduct of the said cause by the said Hope Assurance Company, that is to say, "To the Editor of the Morning Chronicle. Sir—The case in the Court of Exchequer (meaning the said cause in the

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introductory part of this count mentioned), reported a few days since, in which the Hope Life Office (meaning the said Hope Assurance Company) successfully resisted a claim of 5,000*l.* on a policy (meaning the said policy in the introductory part of this count mentioned) which they had issued, on the ground that the life insured (meaning the said J. Stevenson) had not made known a temporary ailment which it was alleged he had had a year before, is of great importance to the public, as shewing the absolute insecurity of such contracts in the Hope Life Office. Here, the life in question (meaning the said J. Stevenson) was a gentleman of most healthy appearance, and proved by his family and friends never to have had a day's serious illness up to the period of the insurance. He appeared at the Hope Office, and before their own medical man, who, after due examination, reported that he was a good and healthy life. He was immediately accepted by the directors, and, upon the faith of their insurance for 5,000*l.*, a corresponding sum was advanced. It was not even pretended that there was any concealment or want of caution and good faith in the insured; nor was it averred that the life had given a false answer to any one question put to him by the examiner. But, upon the more than suspicious and unsupported testimony of an obscure foreigner, given in a foreign country, that this gentleman had had a year before some equivocal signs of a disease, which disease does not affect the duration of life, which is cured with more certainty than any other, and which is never a matter of inquiry with the medical examiners of life insurance offices, the policy, under the conditions of the Hope Office, is invalidated, and payment evaded. By the above decision, it appears, that, if a witness be procured to say, that, at some former period of a gentleman's life, he had had a disease or infirmity which he did not mention at the office when the insurance was opened, the policy may be rendered void, and all the money paid upon it for-

feited to the Hope Company. He may have forgotten the by-gone ailment; he may have thought it not worth mentioning; it might not have been proper to have mentioned it: no matter; the policy is void. But this is not the worst: if there have been neither failure of memory nor of communicativeness; nay, if there have been no previous disease or infirmity whatever; a witness may be forthcoming to supply all that is wanted. The dead man cannot reply to his slanderer. That service, to be sure, might not be unattended with some risk if worked in England; but, under a commission to be worked in Paris, there would be none. As many witnesses to prove anything wanted might be had there as there were twenty-franc pieces to bestow. And, turning from hypothesis to facts, I (meaning the defendant) unhesitatingly affirm that more glaring wilful and corrupt perjury never polluted a Court of justice than was used and commented upon as good evidence during the above trial. Now, then, I ask, if a claim on a policy in the Hope Office may be rendered void by means like these, what security is there in such a policy? Absolutely none whatever! It is, therefore, no more than an act of justice to the public to call their attention to the peculiar construction of a Hope policy. Generally speaking, a life insurance policy contains all that is natural on its face; and this, on the part of the insured, is comprised in averments as to the age and good health of the life proposed. The same form is adopted in a policy in the Hope Office: but, besides this, there is a reference to the conditions which are printed on the back; another reference is to a printed declaration which has been previously signed. In this, according to the usual practice of insurance offices, the insured would suppose that his undertaking was comprised; but here again a few other words are added, which refer to a form which was filled up on first proposing the insurance. Now, strange to say, this first proposal and subsequent decla-

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ration are printed in the same paper, at right angles with each other; so that the person who signs the first proposal cannot see that what he then minutes is to become part and parcel of the subsequent declaration and policy. Again, when he afterwards signs the policy, the first proposal is so placed that he cannot read it, or compare one with the other; and, to increase the difficulty—undesignedly, no doubt—the whole is indistinctly printed in red ink, which few eyes can read with ease. Now, in their first proposal, among other particulars, the proposer is required to state whether the life proposed has had the measles or small pox, or been vaccinated; and the query which enumerates the principal diseases, and which usually concludes with the expression 'or any other disease tending to shorten life,' terminates thus—'or any other disease or infirmity.' And in the declaration it is said, that, if the facts set forth in this proposal be not truly stated, the policy shall be void, and that all the money paid on account of it shall be forfeited. But, where is the man who has never been the subject of any disease or infirmity? There is no such man to be found: a decayed tooth, a whitlow, a pimple, a corn, are each a disease; and who, in proposing an insurance on the life of another, can know whether such other have had a disease or infirmity, or the measles or small pox, &c., except upon information or belief: yet, if he have been misinformed or a witness been procured to swear that he have, after paying hundreds a year upon his policy for a series of years, when the claim arises, the payment may be litigated in the most expensive manner, and evaded, and all the money paid on the policy become a forfeiture to the managers of the Hope Office. If this be the security given by a Hope policy, who would not shrink from a contact with such a security? It may be said, if the proposals for a Hope policy were thus exceptionable, how came the experienced clerk of the Provident (meaning the Provident Life Office), who signed

the papers, so commit his office? The answer is, that even his practical eye was baffled by upside down printing and red ink: and, as he had known nothing but what was straight forward in his own office, he did not distrust another. He knew, that, in sending a gentleman in the prime of life and health, who would have been gladly accepted at any Life Insurance Office of the first class, and for so large a sum as 5,000*l.*, to the Hope Office, a great favor was conferred on that office; and he could not have suspected, that, while the Provident, who had advanced 12,000*l.*, to the life in question, conferred an equal share of the profit of the insurance with themselves on the Hope Office, who had advanced nothing, that office, when the claim arose, would take advantage of any error, if any were discoverable, by which both offices were misled, and by litigation attempt to throw the whole loss upon the Provident. More need not be here said than that the successful ligitation of the Hope Office has thrown a doubt over the security of life insurance generally. The policies in offices of long-established stability and honor will alone be marketable in future. Holders of life estates will be unable to procure advances beyond the amounts to which such offices will insure them; and although, to the Hope Office, who have given up one half of their business (meaning the said business of effecting assurances on lives), and are probably intent upon winding up the remainder, the loss of future insurances may be no object, to the other minor life insurance offices who desire to go on, the suspicion thrown over their transactions is likely to be fatal. I am, Sir, A Member of the Provident Life Office."

The declaration contained other four counts, setting forth different portions of the same libel; and concluded as follows: By means of the committing of which said several grievances by the said defendant as aforesaid, the said Hope Assurance Company hath been and is greatly

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injured in its said good name, fame, and credit with and amongst good and worthy subjects of this realm, insomuch that divers of those subjects, to whom the innocence and integrity of the said Hope Assurance Company in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said Hope Assurance Company not to have exercised and carried on, and not to exercise and carry on the said business with integrity, and to have been and to be guilty of the offences and misconduct so as aforesaid charged upon and imputed to the said Hope Assurance Company by the defendant; and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still do refuse to deal or have any transaction with the said company in its aforesaid business or otherwise, as they were before used and accustomed to have, and otherwise would have had, to wit, at &c. aforesaid. To the damage of the said company of 10,000*l.*; and therefore the plaintiff, as such chairman as aforesaid, for and on behalf of the said company, brings his suit &c.

The defendant pleaded four pleas of justification. The plaintiff demurred specially to the three first pleas, assigning for cause, that the defendant in those pleas had justified parts only and not the whole of the libels and grievances in the declaration mentioned, and yet had in each of them prayed judgment of the whole action; and replied to the last plea. The defendants joined in demurrer, and demurred to the plaintiff's replication.

On the demurrers coming on for argument, the pleas were abandoned, and the contention was whether the plaintiff, as chairman of the company, had authority, under the act of parliament incorporating the company, or otherwise,

to maintain an action for a libel reflecting on the trading and character of the company.

Mr. Serjeant *Talfourd*, for the defendant.—The question is, whether an action of this description can be sustained in the name of the chairman of the Hope Assurance Company, under the provisions of the statute 53 Geo. 3, c. ccvi (*a*). The act does not in terms provide for the

(*a*) Which, after reciting that "difficulties have arisen, and may from time to time hereafter arise, as well in bringing and maintaining actions and suits *for recovering debts and enforcing obligations* now due or hereafter to become due to the said society or partnership, *and in prosecuting persons who may steal or embezzle any money*, goods, or effects of or belonging to the said society or partnership, or who may commit or be guilty of any felony or other crime or offence against, or with intent to injure or defraud the said society or partnership, by reason of its being required by law that all the several subscribers or proprietors to and in such society or partnership should in all or in any of the cases aforesaid sue and prosecute by their several and distinct names and descriptions; and that, by an act passed in the 17th year of his present Majesty, intituled 'An act for registering the grants of life annuities, and for the better protection of infants against such grants' (17 Geo. 3, c. 26), it was and is required that a memorial of every instrument granting any such annuity or rent-charge as is therein mentioned should, within the time therein prescribed, be inrolled in the High Court of Chancery, and that such memorial should, among other particulars, contain the names of all the parties, and for whom any of them are trustees; and also that in every deed, instrument, or other assurance whereby any annuity or rent-charge should, from and after the passing of the said act, be granted, or attempted to be granted, the consideration really and bona fide paid, and also the name or names of the person or persons by whom and on whose behalf the said consideration, or any part thereof, should be advanced, should be fully and truly set forth and described in words at length; and that the said society or partnership, by reason of the number of persons who are or may be interested therein, is unable to comply with the requisitions of the said act in all respects"—"for enabling the said society or partnership the more easily to carry into execution the several objects and undertakings hereinbefore mentioned, and for removing the difficulties aforesaid"—enacts, "That all actions and suits commenced or instituted, or to be commenced

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case of a libel; and the general rule of construction applicable to acts of parliament of this description, which give

or instituted by or on behalf of the said society or partnership called the Hope Assurance Company, against any person or persons, body or bodies politic or corporate, or others, *for recovering any debts, or enforcing any claims or demands now due, or which may hereafter become due or arise to the said society or partnership*, and all proceedings in law or equity relating to the same or other the concerns of the said society or partnership, shall or lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted *in the name of the chairman or secretary for the time being of the said society or partnership, as the nominal plaintiff for and on behalf of the said society or partnership;* and that all actions or suits and proceedings in law or in equity to be commenced or instituted against the said society or co-partnership shall or lawfully may be commenced, instituted, and prosecuted against the chairman or secretary for the time being of the said society or partnership, as the nominal defendant for and on the behalf of the said society or partnership; and that all indictments, informations, and prosecutions by or on behalf of the said society or partnership, for any stealing or embezzlement of any money, goods, effects or property of or belonging to the said society or partnership, or for any fraud, crime, or other offence committed against or with intent to injure or defraud the said society or partnership, shall or lawfully may be had or preferred and carried on in the name of the chairman or secretary for the time being of the said society or partnership; and that, in all indictments and informations to be had or preferred by or on the part or behalf of the said society or partnership, it shall be lawful and sufficient to state the money, goods, effects, or property of the said society or partnership to be the money, goods, effects, or property of the chairman or secretary for the time being of the said society or partnership; and that any crime or other offence committed against or with intent to injure or defraud the said society or partnership, shall or lawfully may in such indictment or information be laid or stated to have been committed against or with intent to injure or defraud the chairman or secretary for the time being of the said society or partnership; and any offender or offenders may thereupon be lawfully convicted of any such crime or offence; and that the death, resignation, or removal, or other act of the chairman or secretary for the time being of the said society or partnership, shall not abate or prejudice any action, suit, indictment, information, prosecution, or other proceedings than de-

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to a certain class of individuals rights derogatory from those of the rest of the public, is, that they confer no powers but such as are expressly and unequivocally given by the words of the act. This will be found to be the language of all the Judges who have been called upon to determine questions of this nature: such expressions will be found in the judgments of the Court in *The King* v. *The Birmingham Canal Company* (*a*). In *Guthrie* v. *Fisk* (*b*), where a private act of parliament intituled "An act to enable a certain insurance society *to sue* and be sued in the name of their secretary," enacted that they might commence all *actions and suits* in his name as nominal plaintiff; it was held that this did not enable the secretary to petition on behalf of the society for a commission of bankrupt against their debtor. Mr. Justice Bayley there says: "In this, as in all similar cases, we must look at the language used by the parties who being in the act; they should be careful to use such language as plainly includes all the cases to which they mean it to apply." It may, therefore, fairly be assumed that the act now under consideration is not to be stretched beyond the express words of it: and from the words used it is manifest that this case is not within it. The title of the act is—'An act to enable the Hope Assurance Company *to sue and be sued* in the name of their chairman or secretary;' and the recital only mentions actions and suits *for recovering debts and enforcing obligations* due to the society. The power *to sue* intended to be given by the act, and the liability *to be sued* thereby imposed, were meant to be reciprocal: and it could never be contended that an action could be maintained *against* the chairman for a libel published by the company. In *Halton* v. *Cove* (*c*), which was an action on

pending by or on behalf of the said society or partnership."

(*a*) 2 Barn. & Ald. 570.

(*b*) 3 Barn. & Cress. 178.

(*c*) 1 Barn. & Adolph. 538.

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the statute 28 Hen. 8, c. 11, s. 5, which gives the profits of every benefice *during vacation* to the next incumbent, under the words of the enacting clause, standing alone, the plaintiff would have been entitled to recover; but the Court held that those words were restrained by the recital. Lord Tenterden says (*a*): "It is very true, as was argued for the plaintiff, that the enacting words of an act of parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet, on a sound construction of every act of parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act, and that the preamble affords a good clue to discover what that object was." [Lord Chief Justice *Tindal.*—According to your interpretation, the company could not bring *trover* against a party for taking their goods.] A libel is an injury to the individuality of the person, and the right of action thereupon dies with the party; but, in trover, an executor may sue for a conversion in the time of his testator. [Mr. Justice *Bosanquet.*—Here, the sting of the libel is, that its object was to induce the world to believe that no one would be safe in insuring in the Hope office. That is an injury affecting the trading interest of the whole body of shareholders.] It cannot be supposed that the writer of the libel intended to slander the whole company, but only some individual members of it. [Lord Chief Justice *Tindal.*—Whose property is affected by the libel? In *Rex* v. *Williams* (*b*), the Court granted a criminal information for a libel upon a public body of men, upon an affidavit stating the publication of the libel by the defendant.] Here, the libeller may himself be a shareholder of the company. Besides, the members of the company are a fluctuating body; and, in the event of damages being recovered in this action, such damages might go to increase the fund of those who

(*a*) 1 Barn. & Adolph. 558. (*b*) 5 Barn. & Ald. 595.

had no interest in the company at the time of the publication of the libel.

Mr. Serjeant *Wilde*, for the plaintiff.—Admitting that the right of the company to sue and their liability to be sued in the name of their chairman or secretary are co-extensive, still, upon the proper construction of the act in question, this action is maintainable. The act has conferred upon the company no exemptions which the other subjects of the realm have not. The plain and manifest intention was, to enable the company to carry into effect the objects they had in view, by removing some of the objections and difficulties which had been found to arise, so as to enable them to perpetuate their existence; and the Court are bound so to construe the act as to give it the effect intended. If the argument on the other side were well founded, no partnership could ever maintain an action for a libel upon their trade; and it is only by reason of the injury to the stock of this company that this action is sought to be maintained. In *Cooke* v. *Batchelor*(*a*), it was held that two or more partners may join in an action of slander for words spoken of them in the way of their trade, whereby they have sustained special damage. There, two persons, woolstaplers and co-partners, who had bought a quantity of wool, to be weighed by themselves, and to be paid for according to weight, brought an action against another for saying of them in the way of their trade, that when the wool was weighed by the plaintiffs there was a pound weight concealed under the brass weight, stating special damage by reason of speaking the words;

(*a*) 3 Bos. & Pull. 150. And see *Bromage* v. *Prosser*, 6 Dow. & Ryl. 296; 4 Barn. & Cress. 247: *Foster* v. *Lawson*, 11 J. B. Moore, 360; 3 Bing. 452.

In a joint action of libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business—Per Mr. Justice Gaselee, in *Haythorn* v. *Lawson*, 3 Car. & Payne, 196.

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it was held, on a general demurrer, that they might well join in the action, because the damages were joint and entire to the plaintiffs as co-partners, who were jointly interested, and a multiplicity of actions would be created if the contrary doctrine were to be maintained. Mr. Serjeant Williams, remarking upon that case, says (*a*); "Though there was special damage laid in the declaration in this case, yet, if words are actionable only because they were spoken of persons in the way of their trade, I conceive that two or more partners may join in an action for the words, though they had sustained no special damage thereby." In the present case, the tendency of the libel is, to give to the world an unfavourable impression as to the mode of carrying on the concerns of the company: the libel in terms states that no one can safely insure with them. All that was decided in *Guthrie* v. *Fisk* was, that a petition to found a commission of bankrupt against a debtor of the company was not within the enactment then before the Court, inasmuch as the company could not comply with the requisites of the statute 5 Geo. 2, c. 30. The words of the enacting part of a statute are never to be restrained by the preamble, unless the preamble shews a clear and express intention to restrain them. In *Doe* d. *Bywater* v. *Brandling* (*b*), it was held, that, in construing acts of parliament, the Court must take into consideration not only the language of the preamble, or of any particular clause, but of the whole act; and if in some of the enacting clauses expressions are found of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect. Here, power is given to the company to prosecute in the name of their chairman for injuries done to their property. Upon what principle, then, are they to be de-

(*a*) 2 Wms. Saund. 117 *a*, n. (*b*) 7 Barn. & Cress. 643.

prived of the civil remedy in the like cases? Lord Coke says (*a*), "Equity is a construction made by the Judges, that cases out of the letter of a statute, yet, being within the same mischiefe or cause of the making of the same, shall be within the same remedie that the statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in expresse terms." In the case of *The Dean and Chapter of York* v. *Middleburgh*, Lord Chief Baron Alexander says (*b*): "It is by no means unusual in construing a statute to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial. It is a mode of construction as familiar to every legal person as expounding the statute by equity. The present case is not only within the words of the statute, but also within its equity. And it would be a very inconvenient principle of construction, to impair the combined effect of these united circumstances by the narrow expressions of the preamble. In a case of *Basset* v. *Basset* (*c*), Lord Hardwicke is reported to have said, that, if the enacting words can take effect in the case, they ought to be extended for that purpose, though the preamble does not warrant it; and that innumerable instances of this kind were in the law books." The language of the statute now in question is large and unrestrained; and the construction to be put upon it must be such as will effectually protect the property of the company, otherwise the object of the act will be defeated.

Mr. Serjeant *Talfourd*, in reply, referred to the judgment of Lord Tenterden in *The King* v. *Barham*, where that learned Judge said (*d*): "Our decision may, perhaps, in this particular case, operate to defeat the object of the 59 Geo. 3, c. 50; but it is better to abide by this conse-

(*a*) Co. Litt. 24. b.
(*b*) 2 Younge & Jervis, 215.
(*c*) 3 Atk. 203.
(*d*) 8 Barn. & Cress. 104.

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quence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature."

Lord Chief Justice TINDAL.—I am of opinion that this action is maintainable in the name of the chairman of this company. I think no one who reads this declaration can doubt that the libel complained of is a libel upon the company generally, and affecting the trade of the partnership, by attacking the mode in which their business is conducted. The declaration alleges that the company carried on the business of effecting assurances on lives, and that the defendant published the libel "of and concerning the company in its aforesaid business." The libel itself imports that the company were in the practice of holding forth to the public hopes that were never meant to be realized: it is undoubtedly a libel upon the trade of the company. It is clear that a libel upon partners affecting their joint concern, would form the ground of an action in the names of the partners. Supposing this company had consisted of two members only, could there be any doubt as to their right to maintain this action? I think not. The only question then is, whether the words of the act enabling the Hope Assurance Company to sue in the name of their chairman or secretary for the time being, entitles the present plaintiff, as chairman of the company, to sue for damages for a libel upon the trade of the partnership. In the construction of statutes, I have always understood the rule to be, that, where there is a clearly expressed intention in an enacting clause, though the words be larger than the preamble of the act, effect must be given to that which is deliberately enacted. It is so laid down by Lord Mansfield in the case of *Perkins* v. *Sewell* (*a*)—"It is certain that the preamble of a statute

(*a*) 1 Sir W. Blac. 659.

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cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble:" and such is the rule as laid down since Lord Mansfield's time. The words of the enacting part of the act in question are, " that all actions and suits commenced or instituted, or to be commenced or instituted by or on behalf of the said society against any person or persons, body or bodies politic or corporate, or others, *for recovering any debts*, or *enforcing any claims or demands* now due or which may hereafter become due or arise to the said society or partnership, and all proceedings in law or equity relating to the same, or other the concerns of the said society or partnership, shall or lawfully may be commenced or instituted and prosecuted in the name of the chairman or secretary for the time being of the said society or partnership as the nominal plaintiff for and on behalf of the said society or partnership." The question is, whether this is not, within the fair meaning of the above enactment, a " claim or demand" due to the company; whether a libellous attack upon the character of the company, the obvious tendency of which must be to deteriorate their joint fund, cannot be made the subject of an action: if not, I do not see how trover or trespass for the conversion of, or for an injury done to, the property of the company, could be maintained in the name of the chairman; and it would be impossible to say that the chairman could not bring these last mentioned actions, or that the difficulty would be thrown upon the company, of joining all the members as plaintiffs upon the record. In the case of *Guthrie* v. *Fisk*, cited in support of the first objection taken in argument on the part of the defendant, the Court held that the words of the act enabling the company *to sue and be sued* in the name of their secretary, did not extend to enable them in like manner to sue out a commission of bankrupt against their debtor. I entirely coincide with that decision: a petition in bankruptcy is

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not a suit or action; and that was the broad ground upon which the Court there proceeded.

It is further objected that there is no reciprocity between the parties to this suit, inasmuch as the defendant could not have sued the chairman of the company for a libel upon him published by the company. It is certainly difficult to suppose an action of this sort to be maintainable against the members of a numerous partnership: but cases may be conceived in which the same principle exists; for instance, suppose a society like this to consist but of two members who both join in the publication of the libel, I can see no reason why an action could not be sustained against the chairman in respect of such libel. But it is unnecessary to decide that point; for, the words of the act in question are capable of receiving a larger construction.

It is further contended, as a reason why this action should not be maintained, that, inasmuch as the company consists of a numerous and fluctuating body of persons, the damages awarded by the jury may go to persons different from those of whom the partnership consisted at the time of the publication of the libel. The defendant, however, is a wrong-doer; and therefore that argument is not open to him. How far the chairman may bring into the stock of the company the damages that may be recovered in this action, is not for us to say. Besides, the sixth section of the statute enacts "that this act and the powers and provisions therein contained, shall extend and be at all times construed to extend to the said society or partnership during the continuance thereof, whether the same do or shall consist or be composed of all or some only of the persons who originally were, or at the time of the passing of this act were, members of the said society or copartnership, or of all or some only of those persons together with some other persons, or of persons all of whom became or shall become members of the said society

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or partnership since the original institution thereof, or since the passing of this act." This seems to me to be an answer to the last objection.

Upon the whole, I think this action is within the intent and language of the statute, and that the objections urged on the part of the defendant are unfounded.

Mr. Justice GASELEE.—I am of the same opinion. If the objection that the parties libelled may not, in consequence of the fluctuation in the members of the company, be those who will receive the damages that may be awarded by the jury, were well founded, no joint stock company or numerous partnership could sue at all.

Mr. Justice BOSANQUET.—I am of the same opinion. The question is, whether the plaintiff, as chairman of the Hope Assurance Company, is authorized by the act of parliament in question to maintain an action for a libel affecting the character and interests of the company at large; and, in order to arrive at the answer, we must ascertain what was the intention of the legislature. In construing acts of parliament, where the intent and meaning of the enacting part is doubtful, the preamble is important; but, if the language of the enacting part be clear and unambiguous, recourse cannot be had to the preamble of the act, to limit or restrain it. Here, the language of the enacting part of the act under consideration is perfectly clear; the intention of the legislature is evident to carry it further than the preamble. The preamble recites that "difficulties have arisen, and may from time to time hereafter arise, as well in bringing and maintaining actions and suits *for recovering debts and enforcing obligations* now due or hereafter to become due to the said society or partnership, and in prosecuting persons who may steal or embezzle any money, goods, or effects of or belonging to the said society or partnership, or who may commit or be guilty of any felony or other crime or

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offence against, or with intent to injure or defraud the said society or partnership, by reason of its being required by law that all the several subscribers or proprietors to and in such society or partnership should in all or in any of the cases aforesaid sue and prosecute by their several and distinct names and descriptions." The enacting clause, for removing the difficulties aforesaid, then provides "that all actions and suits commenced or instituted or to be commenced or instituted by or on behalf of the said society or partnership called the Hope Assurance Company, against any person or persons, &c., *for recovering any debts, or enforcing any claims or demands* now due or which may hereafter become due or arise to the said society or partnership, and all proceedings in law or equity relating to the same, or other the concerns of the said society or partnership, shall or lawfully may be commenced or instituted and prosecuted in the name of the chairman or secretary for the time being of the said society or partnership, as the nominal plaintiff for and on behalf of the said society or partnership." Is the present action brought for enforcing a claim or demand arising to the company? The cause of action is, a libel affecting the trade of the partnership. By the act, the chairman or secretary is substituted as plaintiff for the whole body of partners in all those cases in which the partners collectively might have sued. Power is given to the chairman by the act to prosecute criminally for wrongs committed to the prejudice of the partnership property. Now, it could hardly be contended that an indictment would not lie for this libel: and it would be very singular if no civil remedy could be had for the same injury.

The argument founded on the change of parties has been answered by the observations of the Lord Chief Justice. The damages that may be recovered in this action would, I apprehend, go to the general fund of the company. The sixth section provides for the case of a fluctuation in the members of the partnership.

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Mr. Justice ALDERSON.—I am of the same opinion. The construction of the act of parliament which we ought to adopt is this, that, where all the individuals composing the company, naming them, might have sued, the chairman is by the first section substituted as the nominal plaintiff on behalf of the whole. Inasmuch, therefore, as this action might have been maintained by all the partners, the present plaintiff, as chairman, is authorized to sue.

Judgment for the plaintiff(*a*).

(*a*) If slander be spoken *by* husband *and* wife, there must be separate actions, one against the husband alone for the slander spoken by him, and one against both for the slander by the wife —*Anonymous*, Selw. Ni. Pri. 301. So, for words spoken *of* husband *and* wife, there must be one action by him for the words spoken of himself, and another by both for the words spoken of the wife. *Emmington* v. *Gardiner*, Ibid.

CLEGG *v.* LAFFER.

Wednesday, Nov. 6th.

A declaration for a libel contained in a letter addressed by the defendant to a correspondent abroad, after the common inducement of good fame, &c., set out the libel with innuendos as follows:— "He (meaning the plaintiff) has now become so inflated with self-importance by the few hundreds made in my (meaning the defendant's) service, God only knows whether honestly or otherwise (thereby then and there meaning to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant), that the fellow's brain is turned:"—*Held*, that the latter innuendo was warranted by the libel, although the declaration contained no prefatory averment to give the libel the meaning imputed to it by the innuendo.

CASE for a libel. At the trial before Lord Chief Justice Tindal, at the Sittings at Guildhall after the last term, the following circumstances appeared in evidence:— The plaintiff was a master mariner; the defendant a merchant residing at Liverpool. For about two years prior to July, 1829, the plaintiff had commanded a vessel belonging to the defendant, engaged in trading to the coast of Africa. In July, 1829, the plaintiff left the service of the defendant, and entered into that of Messrs. Tobin & Horsefall, merchants engaged in the same trade. The plaintiff being about to sail to the coast of Guinea in the Moro Castle, the defendant obtained leave from the owners to transmit letters by her; and amongst others

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sent the following, containing the alleged libel, addressed to one Captain Hill:—

"Liverpool, 22nd Oct. 1829.

"Dear Sir,—Having procured the sanction of the owners of the Moro Castle for the conveyance of this letter (notwithstanding the captain's declaring he would put any man in irons that conveyed a letter from me to Africa), I have for object to request you will strictly attend to your former instructions, and use your best endeavours to purchase your cargo as low as possible. [The letter then proceeded with instructions concerning trade.] Should that monster of ingratitude and ignorance (Clegg) at all cross your path in the way of business, I trust you will convince him (holding as you do his Majesty's commission) that you are too much above his level to hold commune with so depraved a character. He has certainly all the mischievous propensities of the monkey, the ignorance of the ass, with the treachery of the hyena, all combined in human form. If the monster had a mind capable of reflection, he must be miserable for the remainder of his days. He has latterly saved me an immensity of trouble; for, he has himself exposed his genuine character so fully and so publicly that he has become the scoff and ridicule of all rational and respectable people. Fortunately for him, while under my protection and guidance (like another bear), people gave him credit for merit and principle the idiot was totally void of. I certainly drew him from obscurity, (to use his own phraseology) not having one shilling to knock against another. He has now become so inflated with self-importance by the few hundred pounds he has made in my service (God only knows whether honestly or otherwise), that the fellow's brain is turned."

On the outside, this letter was addressed "To Captain Hill, Captain Scaife, Captain Byass, or Mr. Davies, Bonny, Africa." It did not, however, appear that it had ever found its way to either of those persons.

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The declaration contained four counts. The question arose upon a portion only of the first and third, which were similar. The first count, after the common inducement of the plaintiff's good name, &c., stated that the plaintiff had not ever been guilty, or, until the time of the committing of the grievances by the defendant as thereinafter mentioned, been suspected to have been guilty of the offences and misconduct thereinafter mentioned to have been charged upon and imputed to him by the defendant, or of being ignorant, ungrateful, mischievous, treacherous, or dishonest; by means of which said several premises the plaintiff, before the committing of the several grievances thereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours to whom he was in any wise known, to wit, at &c.: yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and intending to injure him in his said good name, &c., and to bring him into public scandal, &c., with and amongst all his neighbours, &c., and to cause it to be suspected and believed by those neighbours and subjects that he the plaintiff had been and was guilty of the offences and misconduct thereinafter mentioned to have been charged upon and imputed to him by the defendant, and that the plaintiff was an ignorant, ungrateful, mischievous, and dishonest person, and to vex, harrass, and oppress him the plaintiff, on &c., at &c., in the form of a letter addressed to one Captain Hill, falsely and maliciously did compose and publish, and cause and procure to be published of and concerning the plaintiff, &c., a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libellous matter following, that is to say, &c." [here the whole libel was set out with innuendos: the part objected to was the following]—" He (meaning the said plaintiff) has now become so inflated with self-importance

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by the few hundreds made in my (meaning the said defendant's) service, God only knows whether honestly or otherwise (thereby then and there meaning to insinuate that the said plaintiff had conducted himself in a dishonest manner in the service of the said defendant), that the fellow's (meaning the said plaintiff's) brain is turned."

A verdict having been found for the plaintiff—damages 300*l.*—

Mr. Serjeant *Spankie* moved in arrest of judgment, on the ground that the innuendo above set forth was not warranted by the language of the alleged libel, there being no colloquium, or prefatory matter, averred in the declaration, to give to the libel the meaning imputed to it by the innuendo.—He submitted that the office of the innuendo is, to explain, not to extend, what has gone before; and cited *Rex* v. *Horne* (*a*), *Goldstein* v. *Foss* (*b*), Starkie on Slander (*c*); and *Button* v. *Heyward* (*d*), and *Cromwell's* case (*e*), as to the mode of construction of libellous words.

Lord Chief Justice TINDAL.—It does not appear to me that the innuendo in the present case exceeds the limit which the authorities allow it. From the general tenor of the libel, I think the plaintiff had a right to say that the defendant meant to impute to him dishonest conduct whilst in his (the defendant's) service; and it seems to me that this is going no further than the proper province of the innuendo, provided the jury were satisfied that the libel imported an insinuation of dishonesty in the plaintiff. Many analogous cases are to be found in Comyns's Digest (*f*), where it is said: "If words are slanderous, it

(*a*) Cowp. 672.

(*b*) 6 Barn. & Cress. 154; S. C. (in error) 1 Moore & P. 402; 4 Bing. 489.

(*c*) Title "Innuendo."

(*d*) 8 Mod. 24.

(*e*) 4 Rep. 12.

(*f*) Com. Dig. "Action upon the Case for Defamation," (E 1.), "*Manner of Speaking.*"

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is not material though they are spoken indirectly and obliquely; as, 'I will make thee an example for a perjured knave'—'You may well spend, &c., for you can coin, &c.;' for, that imports that he had coined, otherwise he could not spend, &c.—'He hides, and, *for aught I know*, is a bankrupt.'" These several instances bear so closely upon the present case that I think it was not an incorrect conclusion for the jury to draw, that the defendant used the words in the improper sense attributed to them by the innuendo; and therefore that there is no ground for the present motion.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—No person who reads the libel can for a moment doubt that it intended to impute dishonesty to the plaintiff.

Mr. Justice ALDERSON concurred.

Rule refused (*a*).

(*a*) The words "you are guilty" (innuendo, of the murder of D. D.):—Held, after the verdict, a sufficient charge of murder, though the colloquium were only of the death. *Peake* v. *Oldham*; Cowp. 275; S. C. 2 Sir W. Blac. 960. The words "I am thoroughly convinced that you are guilty (innuendo, of the death of D. D.); and, rather than you should go without a hangman, I will hang you:"—Held actionable. Id. Ibid. The words "I think the present business ought to have the most rigid inquiry; for he, the plaintiff, murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death"—are actionable; and, if doubtful, the doubt is cured by the verdict, *Ford* v. *Primrose*; 5 Dowl. & Ryl. 287.

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Monday, Nov. 4th.

HOLL and Others *v.* GRIFFIN and Another.

A manufacturer deposited goods with a wharfinger at Stockton, for the purpose of being shipped for the defendants' wharf in London, receiving from him receipts describing them. The manufacturer indorsed upon these receipts orders upon the defendants to deliver the goods on their arrival to the plaintiffs; the latter having advanced money upon them. The plaintiffs sent the receipts and delivery orders to the defendants, and demanded the goods. The defendants stated that the goods had not arrived, but promised that when they did arrive they should be forwarded to the plaintiffs:—*Held*, that the defendants, having thus assented to the plaintiffs' title to the goods, could not afterwards dispute it; and that the plaintiffs might maintain trover upon their refusal to deliver them.

THIS was an action of trover brought by the plaintiffs, linen factors in London, to recover from the defendants, wharfingers in Southwark, the value of six bales of linens which had been consigned by one George Wilson, a manufacturer at Brompton, near Northallerton, in Yorkshire, under the following circumstances:—On the 1st April, 1833, Wilson, who was in the habit of consigning goods to the plaintiffs for sale upon a del credere commission, and usually receiving an advance to the extent of about two thirds of the value of each shipment, called upon the plaintiffs in London, and handed to them an invoice and two receipts of a wharfinger at Stockton-upon-Tees for the goods in question, in the following form:—

"Received from Mr. George Wilson, Brompton, two bales [and four bales] linens, marked, &c., to be shipped on board the Fanny, George Hepinstall master, for Beal's Wharf, London.

"Stockton, 29th March, 1833." "For C. Martin.
J. Young."

Upon each of these receipts, Wilson wrote an order for the delivery of the goods to the plaintiffs, as follows:—

"Please deliver these — bales to Messrs. Holl, Oswald, and Hoare, Milk Street. "G. Wilson."

The plaintiffs thereupon advanced to Wilson the sum of 160*l.* upon the credit of these goods; and, on the same day, they lodged the Stockton wharfinger's receipts, together with the orders for the delivery of the goods, with

Semble that wharfingers' receipts pass the property in the goods they represent, by indorsement, in the same manner as bills of lading.

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the defendants (the proprietors of Beal's wharf), who accepted and retained possession of them, and stated that the goods had not been received, but promised that they should be sent to the plaintiffs as soon as the Fanny arrived. The ship sailed from Stockton on the 2nd April, and arrived at the defendant's wharf on the 14th. On the 15th the goods were delivered to Messrs. Law & Co., who claimed them upon the ground of a prior advance of money, which they alleged they had made to Wilson on account of the specific goods.

On the part of the defendants it was contended, that the defendants were not liable in trover, inasmuch as the goods were not in their possession at the time the supposed promise to deliver them to the plaintiffs was made; and that no property in the goods passed by the delivery of the wharfinger's receipts, those documents not being equivalent to bills of lading, which are transferable by the custom of merchants; and that, at all events, the plaintiffs could only be entitled to recover to the extent of the advance they had made upon the goods.

Mr. Justice Alderson, before whom the cause was tried at the first Sitting at Guildhall in Trinity Term last, told the jury that the property in the goods, by the delivery of the wharfinger's receipts, and the orders written thereon, passed to the plaintiffs; and he directed them to find a verdict for the plaintiffs for the value of the goods. The jury stated that wharfingers' receipts were usually negotiated like bills of lading; and they returned a verdict for the plaintiffs for the value of the goods—271*l.* 6*s.* 6*d.*

Mr. Serjeant *Taddy*, in Trinity Term, in pursuance of leave reserved to him, and on the grounds urged at the trial, obtained a rule nisi that this verdict might be set aside, and a nonsuit entered, or that the verdict might be reduced to 160*l.*, the sum advanced by the plaintiffs on

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the credit of the goods.—He cited and attempted to distinguish from the present the cases of *Harman* v. *Anderson* (*a*) and *Stonard* v. *Dunkin* (*b*).

Mr. Serjeant *Wilde* now shewed cause.—Before the intervention of any jus tertii, the goods and the wharfinger's receipts and orders for the delivery of the goods to the plaintiffs were in the hands of the defendants; and they were bound by their promise made before the arrival of the goods to deliver them to the plaintiffs. In *Fowler* v. *Down* (*c*), it is distinctly stated by Lord Chief Justice Eyre, that a factor to whom goods have been consigned, and who has never received them, may maintain trover for them. And in *Spear* v. *Travers* (*d*), where goods being entered with the West India Dock Company in the name of A., he received a check for them, which (having sold the goods to B.) he indorsed and delivered to B., who sold the goods and delivered the check to C. on credit: it was held, that, on C.'s insolvency, A. could not take possession of the goods, although they continued to stand in his name in the books of the company, and the check had not been lodged with them. Dock warrants are no more than mere wharfingers' receipts: and here the jury have found that such documents are in practice considered the same as bills of lading. There can be no reason why they should not be so considered and should not equally pass the property in the goods which they represent; for, when delivered over, they are, by the common consent of commercial men, taken as evidencing a previous contract of transfer by the parties. [The Court here called upon—

Mr. Serjeant *Taddy* to support his rule.—The question

(*a*) 2 Camp. 243; S. C. nom. *Hammond* v. *Anderson*, 1 New Rep. 69.

(*b*) 2 Camp. 344.

(*c*) 1 Bos. & Pull. 44.

(*d*) 4 Camp. 251.

is, whether the property in the goods was transferred by the Stockton wharfinger's receipts, and the orders thereon, to the plaintiffs, so as to entitle them to maintain trover. It has never yet been so held, except where the receipt was given by the defendant himself, or the defendant, *having the goods in his possession at the time*, assents to hold them on account of the transferree—*Lucas* v. *Dorrien* (*a*), *Harman* v. *Anderson*. *Stonard* v. *Dunkin*, *Hawes* v. *Watson* (*b*), *Gosling* v. *Birnie* (*c*). By the law merchant, the indorsement and delivery of a bill of lading passes the property in the goods specified therein; but the like has never yet been held as to a wharfinger's receipt.—At all events, the plaintiffs can only be entitled to recover to the extent of their interest in the goods—*Addison* v. *Overend* (*d*), *Sedgworth* v. *Overend* (*e*). Supposing, therefore, that the property did pass to the plaintiffs, the verdict must be reduced to 160*l.*, the sum advanced by them on the credit of the goods.

Lord Chief Justice TINDAL.—I must confess myself unable to distinguish the present case on any substantial ground from those of *Harman* v. *Anderson* and *Stonard* v. *Dunkin*. The ground upon which I rest my judgment is, that, after what has taken place on the part of the defendants, they cannot set up any objection to the claim of the plaintiffs. It appears that the plaintiffs claim under Wilson, the original owner of the goods. Wilson, having shipped the goods for London, obtained from the plaintiffs an advance upon them, and delivered to them the receipts of the wharfinger at Stockton-upon-Tees, purporting that the goods in question had been received by the wharfinger from Wilson, to be shipped on board a certain

(*a*) 1 J. B Moore, 29; S. C. 7 Taunt. 278.

(*b*) 1 Ry. & Mo. 6; 4 Dow. & Ryl. 22; 2 Barn. & Cress. 540.

(*c*) 5 Moore & P. 160; S. C. 7 Bing. 341.

(*d*) 6 Term Rep. 766.

(*e*) 7 Term Rep. 279.

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vessel for Beal's wharf: and Wilson indorsed upon those receipts an order upon the defendants, the proprietors of Beal's wharf, directing them to deliver the goods to the plaintiffs. On application being made on the part of the plaintiffs at the defendants' wharf, their clerk said that the goods had not yet arrived, but that, when they did, they should be forwarded to the plaintiffs; and he retained possession of the receipts and delivery orders. The ground of distinction that has been attempted to be taken between this case and *Harman* v. *Anderson* and the other cases, is, that there the goods were, at the time the defendant assented to hold them for the plaintiff, or promised to deliver them, *in the actual possession of the defendant*; whereas here they had not arrived. But, inasmuch as the orders were given to the defendants, and they assented and promised to deliver the goods to the plaintiffs, and the goods afterwards arrived, I do not think any such distinction in substance exists. The ground of the decision in *Stonard* v. *Dunkin* was, that the defendant had attorned to the title of the plaintiff. Now, an attornment undoubtedly applies only to a case of possession. Suppose a party to promise a day or two before he is let into possession of premises, that, when he is let in, he will attorn; would not such promise operate as a legal attornment? So, in this case, how can the defendants contend that they are not liable upon their undertaking prospectively given? It seems to me that the promise made by the defendants to deliver the goods to the plaintiffs on their arrival, amounted to a recognition of their title; and that, were we to hold otherwise, we should materially impede mercantile transactions: more particularly when the jury have expressly found that documents of the description of those in question have been accustomed to pass by indorsement in the same manner as bills of lading. Under the circumstances, I think the defendants are not at liberty to controvert the plaintiffs' title to the goods; that the plaintiffs

had a sufficient right of possession to enable them to maintain trover; and that, consequently, they are entitled to retain the verdict for the whole value of the goods.

Mr. Justice GASELEE.—When applied to on the subject, the defendants said that the goods had not yet arrived, but that as soon as they did arrive they should be forwarded to the plaintiffs. When, therefore, the defendants received the goods, they clearly held them for the plaintiffs. I am of opinion that there is no pretence for disturbing the verdict.

Mr. Justice BOSANQUET.—I am of opinion that the plaintiffs are under the circumstances entitled to maintain this action. Wilson, the original proprietor of the goods, delivered them to a wharfinger at Stockton, to be carried by him to the defendants' wharf in London, Wilson receiving from the Stockton wharfinger receipts describing the goods; and Wilson afterwards handed over these receipts to the plaintiffs, with an order upon the defendants to deliver the goods therein mentioned, and an invoice, to the plaintiffs, the latter having made a considerable advance to Wilson on the credit of the goods. This, as between Wilson and the plaintiffs, was a symbolical transfer of the goods: and the jury have expressed their opinion that documents of this description, viz. wharfingers' receipts, passed by indorsement in the same manner as bills of lading. It is objected, however, that the receipts in question were not signed by the defendants, but by the wharfinger at Stockton. But the plaintiffs, having the right of property in the goods as between themselves and Wilson, go to the defendants, and handing over to them the receipts given by the Stockton wharfinger to Wilson, with Wilson's order indorsed thereon directing the defendants to deliver the goods to the plaintiffs, are told by the defendants' clerk that the goods are not yet arrived, but that they will

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be delivered to them pursuant to the order when they should arrive. On whose account, then, did the defendants receive the goods when they did arrive? Did they receive them as the goods of Wilson? Clearly not. The goods, therefore, having been received by the defendants on account and as the property of the plaintiffs, the defendants have no right to object that they have no sufficient title to them.

Mr. Justice ALDERSON.—I am of the same opinion. The case is in substance and effect the same as if the goods had been in the custody of the defendants at the time they undertook to deliver them to the plaintiffs. After that, they could not be allowed to set up the title of any other person. The documents could only have been left with the defendants for the purpose of enabling them to hold on account of the plaintiffs. With respect to the amount of the damages, there could be no doubt: the plaintiffs, if entitled to recover at all, must be entitled to recover the value of the goods.

Rule discharged.

Thursday, Nov. 7th.

CORPE *v.* OVERTON.

The plaintiff, a minor, agreed to enter into partnership with the defendant, such partnership to commence on a future day; and, as a security for the due performance of the agreement on his part, the plaintiff deposited with the defendant 100*l.* On attaining his majority, the plaintiff rescinded the contract, and refused to enter into the proposed partnership:—*Held*, that he was entitled to recover back the 100*l.* in an action for money had and received, he having derived no benefit from the contract, and the deposit being in the nature of a penalty, to which an infant is not liable.

THIS was an action of assumpsit for money had and received by the defendant to the plaintiff's use. The plaintiff, in his particular of demand, stated that the action was brought to recover the sum of 100*l.* paid by him to the defendant under an agreement entered into between the plaintiff and defendant on the 4th of October, 1832 (the

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plaintiff being at that time a minor), and which agreement had been repudiated by him since he became of age. The cause was tried before Mr. Justice Alderson at the Sittings at Westminster in the last term. The handwriting of the respective parties to the agreement was admitted, as also a receipt given by the defendant to the plaintiff for 100*l.* By the agreement, the plaintiff engaged to enter into partnership with the defendant in his business of a tailor, and to pay him 1000*l.*, and execute a partnership deed, to contain the usual covenants, on the 1st of January, 1833. The agreement contained the following clause:—

"And, as a deposit for the due fulfilment of the same on the part of the said A. R. Corpe, the sum of 100*l.* is now paid to the said W. Overton as per receipt, on the condition of the same sum of 100*l.* being deducted from the amount of the said intended purchase, or otherwise in default of the said intended purchase not being duly completed by the said A. R. Corpe according to the aforesaid terms the said sum of 100*l.* shall be forfeited to the said W. Overton; and he the said W. Overton shall be subject to no claim or demand whatever from any person or persons for the sum of 100*l.*, or any other amount, unless any disagreement should arise between the creditors of the said W. Overton and himself, so as to prevent the fulfilment of the said intended partnership; then and in that case only the said A. R. Corpe shall not be actually held liable to forfeit the said sum of 100*l.*; but such point to be decided by two arbitrators, one chosen by each said party."

The plaintiff, finding that he had been induced to sign this agreement by a false representation as to the value of the defendant's business, refused to execute the partnership deed, rescinded the contract, and commenced the present action upon the defendant's refusal to return the 100*l.*

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For the defendant, it was contended, on the authority of *Holmes* v. *Blogg* (*a*), that, if an infant pay money without a valuable consideration, he cannot recover it back in an action for money had and received. It was left to the jury to say whether or not the agreement had been entered into by the plaintiff in consequence of any fraudulent representation by the defendant of any fact that was material. The jury found that it had, and accordingly returned a verdict for the plaintiff, damages 100*l*.

Mr. Serjeant *Goulburn*, in the course of the last term, obtained a rule nisi that this verdict might be set aside and a nonsuit entered, on the ground that the action was not maintainable; or that a new trial might be had, on the grounds that the production of evidence as to the supposed misrepresentation as to the state of the defendant's business, was a surprise upon the defendant, and not within the particular of demand.—Upon the first point *Holmes* v. *Blogg* was cited. There, A. during his infancy paid a sum to B. as a premium for a lease, which he avoided after he became of age, and received no benefit from the occupation from that period: and it was held that he was not entitled to recover back the sum so paid.

Mr. Serjeant *Coleridge* now shewed cause.—The older authorities assume that money paid under circumstances such as the present may be recovered back: the only doubt suggested is, as to the form of the action. In *Austen* v. *Gervas* (*b*), Lord Hobart says: "It was moved that the consideration of the money paid in hand by the plaintiff, being an infant, was void: but to that I answered, that, because it was delivered by his own hands, it was but voidable, to be recovered again by an action of account."

(*a*) 1 J. B. Moore, 466; 2 J. B. Moore, 552; 8 Taunt. 35, 508.
(*b*) Hobart, 77.

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In Viner's Abridgment (*a*), several of the cases are collected—"If an infant leases for years (without rent) and the lessee enters, the infant may have trespass against him"—"If he leases for years, rendering rent, it is at his election to affirm the lease or to have trespass against the lessee for the occupation"—"If he sells goods, it is at his election to make it void, for he may have trespass or debt for the money." The case of *Holmes* v. *Blogg* was twice before the Court. On the first occasion, it was assumed by the Court and bar to be a general principle that an infant might recover back money paid by him with full knowledge of the circumstances. In *Buckinghamshire* v. *Drury* (*b*), Lord Mansfield said: "That infants were not bound by their agreements, was never held universally any where in the world; that, by our law, some agreements bind absolutely, some are void, some are voidable; that, if the transaction were fair, a bargain and sale of lands by an infant for necessaries would be good; that infancy never authorized fraud, as, if goods were delivered to an infant, and he embezzled them, trover would lie against him; or, if he took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent by pretence of infancy; but that, if an infant pays money *with his own hand, without a valuable consideration*, he cannot get it back again; and that, if he receives rents, he cannot demand them again when of age." That dictum of Lord Mansfield was the sole authority upon which the decision in *Holmes* v. *Blogg* was founded. His Lordship makes no distinction between the case of an infant and a person of full age; the latter cannot recover back money where it has been paid with full knowledge on his part of the circumstances under which the payment is made; and Lord Mansfield puts the case of an infant

(*a*) Title "Enfant," (D) 1, 2, 4: and see *Zouch* v. *Parsons*, 3 Burr. 1794.

(*b*) Wilmot's Notes, 226.

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upon the same footing. The point, however, now in dispute was not the point that came before the Court in *Holmes* v. *Blogg*. There, the plaintiff sought to recover back money paid by him as a premium for a lease under which he had for some time held the premises demised: he had received some consideration for the money paid, and he could not at the time the action was brought place the defendant in the same situation as that in which he stood before the contract was entered into. Here, the money was paid under an agreement which ex concessis cannot be enforced against the infant. The agreement is for a future partnership. Conceding the penalty mentioned in it to have been incurred by the plaintiff, the defendant could not recover it, the agreement being totally invalid. *Fisher* v. *Mowbray* (*a*) is an authority to shew that an infant cannot in any way be made liable for a penalty.

Mr. Serjeant *Goulburn*, in support of his rule.—There is no sound distinction between the present case and that of *Holmes* v. *Blogg*. That case underwent mature deliberation, and it expressly decides, that, if an infant pay money without a valuable consideration, he cannot recover it back. It is not contended that the infant is bound to perform the contract: it is perfectly clear, that, when he becomes of age, he may elect to avoid it. In *Holmes* v. *Blogg*, Lord Chief Justice Gibbs says: "He may, it is true, avoid the lease; he may escape the burden of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the law does not enable him to do that. I cannot find this decided; for, I cannot find that any such action as this has ever been brought; but Lord Mansfield has incidentally said

(*a*) 8 East, 330.

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that such an action cannot be brought. In the famous case of *Drury* v. *Drury* (*a*), one of the questions was, whether an infant could by contract bar her dower. Lord Northington thought that the statute applied only to adults; and the marriage of Lady Drury with the Earl of Buckinghamshire took place on his opinion: but the case afterwards came before the House of Lords upon appeal, under the name of *The Earl of Buckinghamshire* v. *Drury* (*b*), when the decree of Lord Northington as to this point was reversed. Lord Mansfield there said, in delivering his opinion, 'If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again' (*c*). What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back. But the authority does not altogether stop here. In Lord Chief Justice Wilmot's Notes of Opinions and Judgments (*d*), it appears that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the Judges; in which majority the learned author, then Mr. Justice Wilmot, was. His note of Lord Mansfield's judgment on this point is in these words; 'If an infant pays money with his own hand, without a valuable consideration, he cannot get it back again.' So that Lord Chief Justice Wilmot had himself taken a note of the declaration of Lord Mansfield, and laid it up among his memoranda, without any expression of disapprobation. He must therefore be taken to have adopted it. We therefore think that this action cannot be maintained, upon the ground that the infant having paid the money with his own hand cannot recover it back again" (*e*). All the cases

(*a*) 2 Eden, 39.

(*b*) Wilmot's Notes, 177; 3 Brown's Parl. Cas 2nd edit. 492; 2 Eden, 60.

(*c*) 2 Eden, 72.

(*d*) Page 226.

(*e*) Lord Chief Justice Tindal seemed to doubt the accuracy of this report.

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relied upon on the other side were adverted to and fully considered by the Court in *Holmes* v. *Blogg*. There can be no doubt but that an infant may lawfully part with any chattel that passes by delivery: and, if he purchase property, he cannot keep it and sue the vendor to recover back the price paid for it.

Lord Chief Justice TINDAL.—I think we may determine this case without at all breaking in upon the decision in *Holmes* v. *Blogg*: the facts of the two cases are distinguishable. In *Holmes* v. *Blogg*, it appears that Holmes, an infant, together with his partner, had taken a lease of certain premises in which they carried on their business, and had paid a sum of 150*l.* 10*s.* as his share of the consideration; and that the premises had been actually enjoyed by them for about ten weeks, when the plaintiff, having become of age, retired from the concern, and quitted the premises. In that case, therefore, the money appeared to have been paid for something that was available at the time as an actual lease; and it was manifest that the plaintiff could not restore the defendant to the same situation in which he stood at the time the lease was granted. Although Lord Chief Justice Gibbs is reported to have used very general expressions in delivering judgment in that case, yet, when he applies the doctrine he is laying down to the circumstances of the case before him, he gives it less latitude. He states the opinion of Lord Mansfield in *The Earl of Buckinghamshire* v. *Drury*; and then adds: "What is the point here? That an infant, having paid money *on a paluable consideration*, and having partially *enjoyed the consideration*, seeks to receive it back." I take the ground of that judgment to be, that the infant had received some value for the money paid, and could not restore the other party to his original situation. Here, the plaintiff has paid the money without the slightest consideration. The contract upon which it was

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paid was either for a present or a future partnership: I construe it as contemplating a future partnership; and it is probable, that, in order to secure the fulfilment of the contract on the part of the plaintiff, the sum of 100*l.* was to be paid down—one term of the agreement being, that, in case of a refusal by the plaintiff to carry the contract for the partnership into effect, the 100*l.* was to be forfeited. When the plaintiff became of age, he declared his election to rescind the contract; which he clearly had a right to do. An infant can incur no personal liability in carrying on trade—*Hill* and *Whittington's* case (*a*), *Whywall* v. *Champion* (*b*): a contract therefore by an infant to enter into trade must necessarily be one that he may lawfully rescind. If, then, the present plaintiff had a right to rescind the contract in question, had he not a right to rescind the *whole contract?* And, if we were to hold that the money paid by the plaintiff on account of the contract cannot be recovered back, how could it be said that the whole contract was rescinded? I therefore think, that, as by law the plaintiff was allowed to rescind this contract, the only question to be looked at, with reference to the case of *Holmes* v. *Blogg*, is, whether any intermediate benefit has been derived under it by the infant. There was no evidence given at the trial as to any benefit derived or to be derived by the plaintiff in the intermediate time between the making of the contract and the period of the commencement of the intended partnership: no division of profits. This case, therefore, differs from that of *Holmes* v. *Blogg* in the very point upon which I conceive that case to have been decided, viz. on the ground of an actual benefit derived to the infant from the contract in consideration of which the money was paid.

But there is another ground upon which I also hold the plaintiff to be entitled to recover, viz. that an infant can-

(*a*) Dyer, 104, n. (*b*) Strange, 1083.

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not enter into any contract with a penalty. This doctrine is as old as the time of Lord Coke—"If before such age (twenty-one) any deed or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them (i. e. infants), all serve for nothing, and may be avoided" (*a*). Now, what is this but a sum handed over by way of penalty?

Upon both these grounds, therefore, I am of opinion that the plaintiff is entitled to recover back the money paid by him, and consequently the verdict must stand.

Mr. Justice GASELEE.—If in holding the plaintiff in this case to be entitled to recover we must of necessity break in upon the decision in *Holmes* v. *Blogg*, I should well consider the point before I concurred in so doing. But so manifest a distinction between the two cases has been pointed out by my Lord Chief Justice, that I entirely agree with him in thinking that this rule should be discharged.

Mr. Justice BOSANQUET.—I agree with my Lord Chief Justice and my brother Gaselee that this rule ought to be discharged; and, in giving that opinion, I do not think we at all impeach the judgment of this Court in *Holmes* v. *Blogg*, as applicable to the facts of that case. There, the plaintiff had for a time the benefit of the contract; and the Court determined that he was not entitled to recover back the money he had paid. I see no reason to find fault with that decision. It is, however, a general rule of law, that, where the consideration for which money has been paid wholly fails, the money may be recovered back: but not where there has been only a partial failure of consideration. An infant is not to be placed in a worse situation than any other person. In this case, the plaintiff has

(*a*) Co. Litt. 171. b.—s. 259.

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derived no benefit whatever under the contract. The contract was for a future partnership, and was put an end to by means which the law allows: the consideration therefore wholly failed. If the law allows an infant to rescind a contract from which he has received no benefit, it necessarily follows that it must allow him to recover back the consideration he has paid for it. There are undoubtedly strong expressions made use of by Lord Chief Justice Gibbs in the case of *Holmes* v. *Blogg*, which if taken ad literam certainly do contravene the judgment the Court are now pronouncing. But we must apply these expressions to the facts of the particular case. In applying the principles he deduced from the authorities he cites to the facts of the case then under consideration, Lord Chief Justice Gibbs says, that the infant having paid the money on a valuable consideration, and having partially enjoyed the consideration, could not recover it back. That was a substantial ground for deciding that case as it was decided. There is, however, no such ground here; and there is no case that I am aware of in which the general dictum of Lord Mansfield in *The Earl of Buckinghamshire* v. *Drury* has been carried into effect. The 100*l.* paid by the plaintiff in this case is in the nature of a deposit; and it is well known, that, if a contract on account of which a deposit has been made is defeated by any legal means, the sum deposited may be recovered back.

If the 100*l.* advanced by the plaintiff be taken to be in the nature of a penalty, the objection to the defendant's holding it is still stronger.

Mr. Justice ALDERSON.—I am of the same opinion. By the terms of this agreement, the parties stipulate for a partnership to commence at a future period; and the plaintiff deposits 100*l.*, which sum is to be forfeited if he fails in the performance of his part of the contract. Before the period arrives at which the partnership is to com-

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mence, the plaintiff (having in the interim only attained his majority) elects to rescind the contract; and the parties are remitted to their original situations. It is plain, on principle, that, if the defendant had by law a right to rescind the contract, there can be no ground upon which the defendant would be entitled to retain the 100*l.* It seems to me that the case is clearly distinguishable from *Holmes* v. *Blogg*. There, the infant enjoyed all the benefit of the lease until he became of age: he could not, therefore, be permitted, after receiving some benefit from the contract, to throw it up and claim the money he had paid for it.

Rule discharged.

NEWMAN *v.* BARNARD, UNWIN, and MATTHEWS.
SKINGLEY *v.* SAME.

Monday, Nov. 11th.

In replevin on a distress for a poor rate under the 43 Eliz. c. 3, the treble damages given to the defendant by s. 19, are, thrice the amount of the damages found by the jury.

The Court refused to stay the proceedings on a judgment of non-pros in such an action, on payment of the *single amount of the rate, thrice the charges of the levy, and the costs.*

THESE were actions of replevin. The plaintiffs were inhabitants of the parish of Little Coggleshall, in the county of Essex; the two first-named defendants, the churchwarden and overseer of the poor of that parish, and the third, the bailiff of the other defendants. Warrants of distress had been issued against the respective plaintiffs for arrears of poor-rates—in the former action for 53*l.* 5*s.*, in the latter for 34*l.* Under these warrants the goods of the plaintiffs were seized. The costs of the distress in each case amounted to 2*l.* 9*s.* The plaintiffs replevied, but, failing to reply, judgments of non pros were signed by the defendants.

Mr. Serjeant *Talfourd*, on a former day in this term, obtained rules calling upon the defendants to shew cause why, upon payment of the amounts due for rates and the charges for the warrants of distress in the respective actions, together with costs to be taxed by one of the pro-

thonotaries of this Court, all proceedings on the judgments of non pros should not be stayed.—He referred to *Hopkins* v. *Shrode* (*a*), where the Court, in an action of replevin under the statute 11 Geo. 2, c. 19, s. 12, stayed the proceedings upon payment of the rent and costs only.

Mr. Serjeant *Wilde* now shewed cause.—By the 19th section of the statute 43 Eliz. c. 3 (*b*), the defendants are entitled to treble damages, as well as costs, in such a case as the present—the term nonsuit in the clause being intended to embrace a non pros. The defendants, coming to intercept the remedy provided by the statute, are entitled to no favour. The treble damages are, thrice the amount of the rate and thrice the expenses of the levy.

(*a*) 1 Bos. & Pull. 382.

(*b*) By which it is enacted, "that, if any action of trespass or other suit shall happen to be attempted and brought against any person or persons for taking of any distress, making of any sale, or any other thing doing by authority of this act, the defendant or defendants in any such action or suit shall and may either plead not guilty, or otherwise make avowry, cognizance, or justification for the taking of the said distresses, making of sale, or other thing doing by virtue of this act, alleging in such avowry, cognizance, or justification, that the said distress, sale, trespass, or other thing whereof the plaintiff or plaintiffs complained, was done by authority of this act, and according to the tenor, purport, and effect of this act, without any expressing or rehearsal of any other matter or circumstance contained in this present act: to which avowry, cognizance, or justification the plaintiff shall be admitted to reply that the defendant did take the said distress, made the said sale, or did any other act or trespass supposed in his declaration, of his own wrong, without any such cause alleged by the said defendant; whereupon the issue in every such action shall be joined to be tried by verdict of twelve men, and not otherwise, as is accustomed in other personal actions: and upon the trial of that issue, the whole matter to be given on both parties in evidence, according to the very truth of the same; *and after such issue tried for the defendant, or nonsuit of the plaintiff after appearance, the same defendant to recover treble damages*, by reason of his wrongful *vexation in that behalf*, with his costs also in that part sustained, and that to be assessed by the same jury or writ to inquire of the damages, as the same shall require."

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Mr. Serjeant *Talfourd*, in support of his rule.—In *Hopkins* v. *Shrode*, the party was clearly entitled to treble costs under the statute 11 Geo. 2, c. 19, s. 12. Under either statute, the Court may exercise its discretion. At all events, the treble damages cannot be more than treble the expenses incurred by reason of the distress, exclusive of the amount of the rate.

Lord Chief Justice TINDAL.—The statute expressly provides, that, where any action shall be brought for taking any distress, or for any other thing done by authority of the act, after issue tried for the defendant, or nonsuit of the plaintiff after appearance, the defendant shall recover *treble damages* by reason of his wrongful vexation in that behalf. This application, in effect, calls upon us to abrogate an act of parliament. *Hopkins* v. *Shrode* was not a case of treble *damages*, but of treble *costs:* and costs are more immediately under the jurisdiction of the Court. Here, the act gives *treble damages, after issue tried for the defendant*, which must mean three times the amount of the damages found by the jury.

The rest of the Court concurring, the rule was about to be *discharged, with costs;* when it was agreed between the parties that the treble damages should be taken to be only thrice the expenses of the levy; whereupon the rule in each action was made—

Absolute, on payment of 7*l.* 7*s.* and costs (*a*).

(*a*) See *Butterton* v. *Furber*, 4 J. B. Moore, 296; S. C. 1 Brod. & Bing. 517. There, in a similar case to the present, the defendant sought to recover *treble costs*, as well as *treble damages*: but the Court held that the act gave only *treble damages* and *single costs*.

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ANONYMOUS.

Wednesday, Nov. 13th.

In ejectment on a vacant possession, the affidavit that six months' rent are in arrear may be made by a receiver.

MR. Serjeant *Jones* moved for judgment against the casual ejector, in an ejectment upon a vacant possession. An objection had been taken by the Secondary to the affidavit of six months' rent being due, which was sworn, not by the lessor of the plaintiff, but by a receiver who had for many years taken the rent. The lessor of the plaintiff resided in Yorkshire. The premises were situate in London.

Lord Chief Justice TINDAL.—I think the affidavit of the receiver is sufficient.

Granted.

CORBYN *v.* LEADER.

Thursday, Nov. 14th.

The defendant, the master of a ship, let the cabins to the plaintiff for the conveyance of passengers from Calcutta to London; and covenanted (amongst

THIS was an action of covenant. The declaration stated, that, by an agreement under seal, the defendant, master of the ship Oriental, did grant and let to the plaintiff the whole of the cabins and accommodations fitted up for the reception, convenience, and conveyance of passen-

other things) that he would promote in as far as in him lay the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board of the said ship or vessel: and the plaintiff covenanted with the defendant, that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or ports, for stock or otherwise, save and except St. Helena, he the plaintiff would bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon:—*Held*, that a refusal on the part of the defendant to put into the Cape of Good Hope at the request of the plaintiff, provided such request could be complied with without endangering the vessel, was a breach of the defendant's covenant; and that a breach alleging that the defendant did not nor would promote so far as in him lay the comfort and convenience of the plaintiff, &c., and that, although it was necessary for the convenience of the plaintiff to touch and put into an intermediate port, and the plaintiff was ready and willing to bear and pay all port and other charges which might be incurred thereby, and requested the defendant to put into the Cape, the defendant refused so to do—was sufficient after verdict.

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gers in and on board of the ship or vessel called the Oriental, then bound to sail from the port of Calcutta, on a voyage to the port of London, by the way of and touching at St. Helena, both above and below, together with the whole of the spaces between decks from the stern of the ship or vessel to the extremity of the sail-room; and that the plaintiff should have the whole and exclusive attendance, services, and attention of the three servants, the cook, steward, and butcher, then in and on board the said ship, in their exclusive station and calling; but that the said servants should nevertheless be held to be under the control and guidance of the defendant whenever he might think fit to call on them as commander of the said ship or vessel, and so that it should not unnecessarily interfere with the duties belonging to the cuddy table and the necessary comfort of the passengers thereof; and that, subject as aforesaid, they the said servants should be respectively placed under the control of the plaintiff, and subject to his orders: and the defendant did thereby further covenant, promise, and agree to and with the plaintiff that he would to all reasonable and proper extent uphold and support the authority of the plaintiff in the observance of discipline and proper order and government of the passengers to be retained by him, and that he would in no way interfere or interrupt any of the same without the request of the plaintiff, unless they or any of them should interfere with the order and good government of the ship, and contravene the orders of the defendant in the management of the navigation of the said vessel; and, generally, that the defendant *would promote*, as far as in him lay, *the comfort and convenience of the plaintiff, and such persons as he should engage and contract with, and who should be received as passengers* in and on board of the said ship or vessel: in consideration whereof, the plaintiff did thereby for himself covenant, promise, and agree to and with the defendant, among other things, to

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pay the defendant the sum therein agreed on; and that he would in every respect support and uphold the authority and command of the defendant, and in no way interfere with the management or navigation of the ship, or with the officers thereof: and the plaintiff did thereby further covenant, promise, and agree to and with the defendant, that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or or ports, for stock or otherwise, save and except St. Helena aforesaid, that the plaintiff would bear and pay all the port and other necessary charges which might be incurred thereby or consequent thereon. The declaration then assigned for breach, that the defendant did not nor would during the voyage promote, as far as in him lay, the comfort and convenience of the plaintiff or the persons whom he engaged and contracted with, and who were received as passengers in and on board the said ship or vessel; but that the defendant from time to time during the voyage, to wit, on the 1st January, 1832, and on divers days and times afterwards, and before the completion of the voyage, neglected and refused so to do, contrary to his covenant in that behalf, to wit, at &c.: and further, that, although during the voyage, to wit, on the 1st April, 1832, and on divers days and times afterwards, it was necessary for the convenience of the plaintiff to touch and put into an intermediate port for stock and otherwise, besides St. Helena, to wit, at the port of the Cape of Good Hope, and the plaintiff was then and there ready and willing to bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon, and requested the defendant to touch and put into such port of the Cape of Good Hope for the purposes aforesaid; yet the defendant then and there wholly neglected and refused so to do, contrary to his said covenant in that behalf.

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The defendant pleaded several pleas. Those applicable to the present point were—That the defendant did at all times during the said voyage promote as far as in him lay the comfort and convenience of the plaintiff and the persons whom he engaged and contracted with and who were received as passengers in and on board the said ship or vessel, according to the form and effect of the said agreement and of the covenant of the said defendant in that behalf made—That it was not necessary during the said voyage for the convenience of the said plaintiff to touch and put into an intermediate port for stock and otherwise besides St. Helena, modo et forma—That the plaintiff was not ready and willing to bear and pay all port and other necessary charges which might be occasioned or consequent on the touching at an intermediate port for stock and otherwise besides St. Helena—That the plaintiff did not request the defendant to touch and put into the port of the Cape of Good Hope, for the purposes of stock or otherwise—and that the defendant did not neglect or refuse to touch and put into the port of the Cape of Good Hope: whereupon issues were joined.

The cause was tried before Lord Chief Justice Tindal, at the Sittings at Guildhall after last term. The breaches of covenant of which the plaintiff complained were—first, a diminution of the usual allowance of water to the passengers before the arrival of the vessel at the Cape—secondly, an obstruction occasioned upon the deck from the stowing of certain luggage—thirdly, not going into the Cape of Good Hope when requested to do so by the plaintiff. For the first of these breaches the jury gave 50*l.* damages; for the second, 25*l.*; and for the third, 50*l.*

Mr. Serjeant *Taddy*, on a former day in this term, moved that the verdict might be reduced by the amount of the damages found for not taking the ship into the Cape.—He submitted—first, that there was no co-

venant in the agreement upon which any such breach could be assigned—secondly, that the breach was not well assigned.

Mr. Serjeant *Wilde*, contra, submitted that, it being alleged upon the record that it was necessary for the comfort and convenience of the plaintiff to touch and put into the Cape of Good Hope, it must after verdict be taken to have been necessary; and consequently the breach was well assigned. [The Court called upon—

Mr. Serjeant *Taddy* to support his rule.—The agreement contains no express covenant on the part of the defendant that he would go into the Cape of Good Hope. It was for the captain alone to consider into what ports it would be convenient or proper to put in the course of the voyage: and there is an express covenant on the part of the plaintiff that he would in no way interfere with the management or navigation of the ship, or with the officers thereof. The defendant might have had good reason for thinking it not consistent with the good government of the ship to comply with the plaintiff's request. And in the absence of an express covenant to go into the Cape, there is nothing to warrant the breach alleged. Implied covenants are to be narrowly construed. In *Rhodes* v. *Bullard* (*a*), the lessor, after a demise of certain premises, with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself *whilst the same should remain there*, paying half the expenses of the repairs." It was held that the words "whilst the same should remain there," reserved to the lessor a power to remove the pump at his pleasure, and that it was no breach of the covenant that he removed it without reasonable cause, and in order to

(*a*) 7 East, 116.

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injure the lessee: but that, without those words, it would have been a breach of the covenant to remove the pump. So, here, the plaintiff has not used words adequate to the creation of such a covenant as that of which he has in his declaration charged a breach.

Lord Chief Justice TINDAL.—I am opinion that the judgment of the Court upon the breach lastly assigned in the declaration in this case ought to be given for the plaintiff. Two objections are urged on the part of the defendant—first, that the breach alleged in the defendant's refusing to touch and put into the Cape of Good Hope, when requested by the plaintiff so to do, was not within the covenant entered into by the defendant—secondly, that no breach is properly and substantially assigned within that covenant.

Upon the first objection, the question is, whether upon the face of the agreement it is apparent that the parties intended that the vessel should stay at the Cape of Good Hope, if the comfort and convenience of the passengers rendered such stay necessary. The words of the defendant's covenant are, "that he would promote, as far as in him lay, the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board of the ship." If the deed had stopped there, I should have been inclined to hold it to be a reasonable demand on the part of the plaintiff, and contributory to the comfort and convenience of the passengers, that they should be allowed to stop during the course of the voyage. But there is a subsequent covenant by which the plaintiff contracts with the defendant, "that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or ports, for stock or otherwise, save and except St. Helena, the plaintiff would bear and pay all

port and other necessary charges which might be incurred thereby or consequent thereon." Is not this an express stipulation shewing that the stopping at an intermediate port was one of the comforts and conveniences in the contemplation of the parties at the time of entering into the agreement. It has been contended on the part of the defendant, that, the plaintiff having covenanted not to interfere with the ship, the defendant's covenant to promote as far as in him lay the comfort and convenience of the plaintiff and such persons as he should engage and contract with, must be understood to mean only in so far as the supposed comfort and convenience of the passengers did not interfere with the management of the vessel; and that the plaintiff's requiring the defendant to stop at the Cape was a violation of his covenant. This argument is open to two answers—first, that, when the plaintiff covenants not to interfere with the management or navigation of the ship, such covenant points, not to a stopping at an intermediate port in the course of the voyage, but merely to the management and navigation of the ship during the voyage—secondly, that that is a separate and distinct covenant, a condition subsequent, not precedent, and should have been pleaded. The defendant might have stated upon the record that stopping at the Cape as requested would have endangered the vessel; and that would have been a question for the jury.

If, therefore, stopping at the Cape of Good Hope at the request of the plaintiff be a stipulation that the defendant has virtually entered into by his covenant, is the breach properly alleged in the declaration? The objection, be it remembered, comes after verdict. The breach is couched in the very terms of the agreement itself—"That the defendant did not nor would during the voyage promote as far as in him lay the comfort and convenience of the plaintiff or the persons whom he engaged

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and contracted with, and who were received as passengers in and on board of the said ship or vessel, but neglected and refused so to do, contrary to his covenant in that behalf; and that, although during the voyage, to wit, on &c., it was necessary for the convenience of the plaintiff to touch and put into an intermediate port, for stock and otherwise, besides St. Helena, to wit, at the port of the Cape of Good Hope, and the plaintiff was then and there ready and willing to bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon, and requested the defendant to touch and put into such port of the Cape of Good Hope for the purposes aforesaid, yet the defendant then and there wholly neglected and refused so to do, contrary to his said covenant in that behalf." The breach is certainly not alleged so artificially as it might have been, still I think it is sufficient, after verdict.

Mr. Justice GASELEE.—I am of the same opinion. The plaintiff's covenant not to interfere with the management or navigation of the ship, is not incompatible with his right to require the defendant to stay at an intermediate port in the course of the voyage; for, it is clear from the subsequent part of the agreement that such an event was in the contemplation of the parties; and it by no means follows that it would interfere with the management of the ship. If it would so, the defendant should have introduced that fact into his defence. The breach is certainly not very artificially framed: it ought to have gone on to aver that it was in the power of the defendant to go into the Cape of Good Hope. The defendant, however, has not replied that it was not in his power to comply with the plaintiff's request to touch at the Cape; he has not set up any excuse for his breach of covenant; but he merely says that he was not required and did not refuse so to do. Not

having demurred specially to the breach alleged, the defendant cannot now take advantage of the defect in arrest of judgment.

Mr. Justice BOSANQUET.—I am of the same opinion. The declaration is framed upon a covenant in very general terms entered into by the defendant, that he would promote as far as in him lay the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board of the said ship: and the question is, whether the breach assigned is within that covenant. When we look at the rest of the deed, and find a covenant on the part of the plaintiff, that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or ports, for stock or otherwise, save and except St. Helena, he the plaintiff would bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon, it manifestly appears that going into the Cape of Good Hope was one of the things in the contemplation of the parties. It is admitted on the pleadings that it was necessary for the convenience of the plaintiff to stay at the Cape. It is said, however, that the plaintiff's requiring the defendant to go into the Cape of Good Hope was an interference with the management and navigation of the ship, and that his covenant not to do so was a proviso controlling the previous covenant of the defendant to promote the comfort and convenience of the plaintiff and his passengers. Supposing this to be so; the two covenants are found in different parts of the deed; and therefore the latter, if its effect be as contended, should have been pleaded.

Mr. Justice ALDERSON.—I am of the same opinion. By

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the terms of the agreement the plaintiff was to have the sole government of the passengers, and the defendant of the ship. The defendant covenants that he will to all reasonable and proper extent uphold and support the authority of the plaintiff in the observance of discipline and proper order and government of the passengers to be retained by him, and that he will in no way interfere or interrupt any of the same without the request of the plaintiff, unless they or any of them shall interfere with the order and good government of the ship, and contravene the orders of the defendant in the management of the navigation of the vessel; and the plaintiff covenants that he will in every respect support and uphold the authority and command of the defendant, and in no way interfere with the management and navigation of the ship, or the officers thereof: these two covenants have reference to a totally different object from that declared on. The covenants that are correlative are, the covenant on the part of the defendant to promote the comfort and convenience of the plaintiff and his passengers, and the covenant of the plaintiff, that, if it should be necessary for his convenience to put into any intermediate port, except St. Helena, he would bear and pay all port and other necessary charges which might be thereby incurred. This latter covenant explains the former.

Rule discharged.

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CANNAN and TOPLIS, Assignees of RUSSELL, a Bankrupt, v. DENEW.

Friday, Nov. 15th.

TROVER for furniture. At the trial before Lord Chief Justice Tindal, at the Sittings at Guildhall after last Hilary Term, a verdict was found for the plaintiffs, damages one shilling (the defendant undertaking to deliver up the furniture which was the subject of the action), subject to the opinion of the Court upon the following case:—

"On the 31st October, 1832, a fiat issued against Villaroy Russell, under which he was duly declared a bankrupt, and the plaintiff David Cannan was appointed official assignee on the 5th November, 1832, and the other plaintiff was chosen by the creditors as the other assignee on the 20th of the same month. The defendant is an auctioneer. The action was brought to try the validity of the defendant's title to a large quantity of furniture and other chattels, contained in seven houses at Brighton in Sussex, and comprised in a certain bill of sale, dated the 5th September, 1832, and made between the bankrupt of the one part, and the defendant of the other part. This bill of sale—after reciting that the bankrupt had applied to the defendant for a loan of 2,700*l.*, the repayment of which, with interest, was to be secured by the indenture thereinafter recited and the further security thereinafter contained; and that accordingly, by indentures of lease and release, the release bearing even date with the bill of sale, certain freehold, copyhold, and leasehold property of the bankrupt had been conveyed by him to trustees upon trust (amongst other things) to pay the said sum of 2,700*l.* and interest to the defendant; and also reciting that such fur-

A person who keeps livery stables, and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and *sells to any person* generally, is a trader subject to the bankrupt law.

J. S., after having committed a secret act of bankruptcy, borrowed of the defendant 2,700*l.*, assigning to him by way of security certain furniture and effects; with a power of sale in case of non-payment by a specified day, and a clause of redemption on payment of principal and interest. The furniture remained in the possession of J. S., and within two calendar months after the assignment a fiat issued against him:—*Held*, that the assignees might recover the value of the goods in trover; and that the transaction was not protected as a *payment* within the 82nd section of the 6 Geo. 4, c. 16.

A case that is within the 81st section of the 6 Geo. 4, c. 16, is excluded from the operation of the 82nd.—Per Mr. Justice Alderson.

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ther advances as thereinafter mentioned should be secured in the manner thereinafter expressed—purports, in consideration of the said sum of 2,700*l.*, and to secure the repayment of that as well as other subsequent loans from the defendant to the bankrupt, to assign all the bankrupt's furniture and other chattels (being the property in question) in seven of his houses at Brighton, to the defendant, upon trust to permit the bankrupt to possess and take the profits of the said chattels till the 25th March, 1833, and then to reassign them to the bankrupt, if the said sum of 2,700*l.*, as well as all such subsequent loans as aforesaid, together with interest, and all charges and expenses attending the same, should have been paid to the defendant; but, if not, that, until such payment should be made, the defendant should possess and take the profits of the said chattels, upon trust to sell them at any time after the 25th March, 1833, without the bankrupt's concurrence, and to do all acts necessary to effect such sales, and out of the proceeds thereof to retain all expenses incurred by him in executing the trusts of that deed, to repay himself the said 2,700*l.* and all other such subsequent loans, together with all charges and expenses attending the same as aforesaid, and to pay over the surplus to the bankrupt. This deed contained covenants by the bankrupt to repay all further advances from the defendant to himself, not exceeding in the whole 100*l.*, with interest, on or before the 25th of March, 1833, or within six calendar months from the respective times of such advances being made; and to keep the said chattels insured against damage by fire in 3,000*l.*, in the defendant's name. There was also a proviso that the defendant should, previously to any sale under the powers of the deed, give one calendar month's written notice to the bankrupt: and the usual powers were given to the defendant to complete the sales, and for enabling him to keep up the insurance in default of the bankrupt's so doing; with the usual protection to purchasers. This deed was duly executed.

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"At the trial, the only questions were, as to the trading, the act of bankruptcy, and the effect of the bill of sale of the 5th September, 1832: when the following facts appeared in evidence:—

"In the year 1825, the bankrupt had built about twenty-seven houses at Brighton; and, in August, 1827, being desirous of letting some of them as ready-furnished houses, employed the defendant Toplis and his father (who were the petitioning creditors) to supply him with furniture; which they did, and for which they are now creditors of the bankrupt's estate. About eight houses were furnished, and let to tenants at greatly increased rents for some years previously to Michaelmas, 1831. The bankrupt also kept mews, containing coach-houses, and stabling for thirty-eight horses, which he let to any persons who wanted them, either by the year, for a month, a week, or a day. He also *took in horses to stand there at livery*, at different prices, varying according to the number of feeds of corn supplied to them; and employed an ostler, who had one or two helpers, as occasion required, to attend to them. *He was in the habit of buying hay and straw and oats, which he laid up in the stable he himself occupied, and supplied to the horses standing in the mews*, or *sold to any person who wanted them, as is done in all livery stables.* Cards were distributed about Brighton, to shew that horses and carriages were to be taken in at the mews of the bankrupt; and one of the witnesses, who had been his ostler there, stated that he had so much per week for managing the mews, and that his object was, to take in any horses he could catch.

"The bankrupt ceased to occupy the mews at Michaelmas, 1831. An act of bankruptcy on or about the 26th of June, 1832, was proved: and the bill of sale of the 5th of September, 1832, was put in by the defendant, and read."

The questions for the opinion of the Court were—first,

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"whether there was a sufficient trading proved, within the 2nd section of the 6 Geo. 4, c. 16, either by buying and selling, or by buying and letting to hire:" and, if there were, then—secondly, "whether the assignment of the furniture and chattels by the bill of sale of the 5th September, 1832 (being a transaction after an act of bankruptcy, and within two months of the date and issuing of the fiat), was protected by the 82nd section of the 6 Geo. 4, c. 16." If the Court should be of opinion that a sufficient trading was proved, and that the assignment was not protected by any clause in the above act, then the verdict was to be entered for the plaintiffs as aforesaid: but, if the Court should be of opinion, either that a sufficient trading was not proved, or that the assignment was protected by the 6 Geo. 4, c. 16, s. 82, then a nonsuit was to be entered.

The case now came on for argument.

Mr. Serjeant *Jones*, for the plaintiff.—The case states a letting to hire of goods, which is enough to constitute the bankrupt a trader within the 2nd section of the 6 Geo. 4, c. 16. It further states that the bankrupt kept mews, where he took in horses to stand at livery; and also that "he was in the habit of buying hay, straw, and oats, which he supplied to the horses standing in the mews, or *sold to any person who wanted them*, as is done in all livery stables." The fact of trading, therefore, is established beyond all question.—Then, as to the construction of the 81st and 82nd sections of the statute 6 Geo. 4, c. 16—The transaction out of which this question arises, having taken place within two months of the issuing of the fiat, the case is not within the former clause; neither is it within the latter, it not being a payment to the bankrupt in the usual and ordinary course of business (*a*). [The Court called upon—

(*a*) The 81st section enacts, "That all conveyances by, and all contracts and other dealings and transactions by and with any bank-

Mr. Serjeant *Talfourd*, for the defendant.—It would be a very strained construction of the statute, to hold this person a trader within the meaning of the 2nd section of the 6 Geo. 4, c. 16, by reason of his letting out lodgings. In *Smith* v. *Scott* (*a*), where it was held that one who keeps a lodging-house, supplying the guests with provisions at a small profit (such provisions not forming any common stock of the house, but being set apart for the particular individual or family for whom they are procured), is an hotel-keeper within the meaning of the 6 Geo. 4, c. 16, s. 2, and as such subject to the bankrupt law—it was not contended that the party was subject to the bankrupt law by

rupt bona fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: Provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed."

And the 82nd section enacts, "That all *payments* really and bona fide made or which shall hereafter be made *by* any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: and all *payments* really and bona fide made or which shall hereafter be made *to* any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

(*a*) Ante, Vol. 2, p. 35.

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reason of the letting to hire of furnished lodgings; but the case proceeded upon the ground of her coming within the specific description of an "hotel-keeper" in the act. Then, as to the supposed trading in hay, straw, and oats—It is scarcely possible for the Court to say upon this statement in the case, unless they can take judicial notice of that which is usually done in livery stables, whether the bankrupt was or was not a trader and subject to the bankrupt law. The purchase and sale of hay, straw, and oats, as stated in the case, must be taken to mean only a buying and selling incidental to the business of a livery-stable keeper—like the sale of books and shoes by the schoolmaster in *Valentine* v. *Vaughan* (*a*): or a mere occasional sale of the overplus beyond that which was required for the party's own consumption, as in the case of the farmer, where it was held that the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader subject in that respect to the bankrupt laws (*b*).

This was, at all events, a *payment* protected by the 82nd section of the statute 6 Geo. 4, c. 16, The word "*payment*" in this clause, as well as in the prior enactment in the 1 James 1, c. 15, (s. 14), has received a liberal construction, and has been extended much beyond that which the word would at first sight seem to warrant. In *Cash* v. *Young* (*c*), it was held that the goods of a trader bonâ fide sold to and paid for by a customer in the interval between a secret act of bankruptcy by the seller and the suing out of a commission, without the purchaser's knowledge of the bankruptcy, are not recoverable in trover by the assignees under a commission issued against the seller, such payment being protected by the statute 1 Jac. 1,

(*a*) Peake, 76.

(*b*) *Bolton* v. *Sowerby*, 11 East, 274.

(*c*) 3 Dow. & Ryl. 652; S. C. 2 Barn. & Cress. 413.

c. 15, s. 14. In *Hill* v. *Farnell* (*a*), where A. purchased of B., a hop merchant, a library, and paid him the value; and B. had at that time committed an act of bankruptcy, of which A. had no knowledge: it was held that the assignees could not recover the value of the books, *without at least tendering the price*, inasmuch as the payment made by A. was declared valid by the 6 Geo. 4, c. 16, s. 82; and, in order to give full effect to that enactment, A. must at least have a lien on the books in respect of which he had made the payment, until the assignees tendered him the sum paid. Lord Tenterden there says (*b*): "The new statute declares that the payment shall be deemed valid; but if, notwithstanding the payment to the bankrupt, the assignees can recover back the goods without offering to return the money, the payment will not be valid for any beneficial purpose to the party paying. And the only mode, therefore, in which effect can be given to the words of this section, is, to hold that the party paying shall retain the goods, so long at least as he is kept out of his money. It is not necessary for us, in the present case, to say what would be the effect of an offer on the part of the assignees to return the money and rescind the sale. It will be time enough to decide the point when it shall in fact arise; an event not very likely to happen on a bona fide sale." The present case is in principle within *Hill* v. *Farnell:* and the distinction between this case and those that fall within the 6 Geo. 4, c. 16, s. 81, is, that, under that section, the conveyance must be given for a by-gone debt; whilst here the payment of the money and the assignment are simultaneous transactions. The case of *Carter* v. *Breton* (*c*) may seem to be an authority

(*a*) 9 Barn. & Cress. 45.

(*b*) 9 Barn. & Cress. 51, 52.

(*c*) 4 Moore & Payne, 424; S. C. 6 Bing. 617.—A coach-proprietor, after committing an act of bankruptcy, which was unknown to the defendant, requested him to accept a bill of exchange for 98*l.*, at three months' date, for his, the bankrupt's, accommoda-

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against the construction contended for: but that was a case of set-off, and clearly not a payment within the 82nd section of the statute.

Lord Chief Justice TINDAL.—I think there is no ground for either of the objections that have been urged on the part of the defendant. As to the first—I think it impossible to read this case, and give the ordinary meaning to the words used in it, without coming to the conclusion that the bankrupt was a person who traded in hay, straw, and oats. The case states that the bankrupt "was in the habit of buying hay and straw and oats, which he laid up in the stable he himself occupied, and supplied to the horses standing in the mews, or *sold to any person who wanted them.*" It is true, it is added—"as is done in all livery stables:" but, unless we can infer from these words a more limited and qualified mode of selling than the preceding words of themselves in their ordinary sense would convey, we can only take it that the bankrupt sold generally to any person who chose to purchase. In the case of an innkeeper, before the late act, 6 Geo. 4, c. 16, it was always an inquiry at Nisi Prius, whether he simply supplied the articles as an inn-keeper to the guests in his house, or furnished them to other persons out of his

tion. The defendant accepted the bill, which the bankrupt immediately indorsed and gave to a creditor in payment for corn. After this transaction, but on the same day, the bankrupt agreed to sell the defendant four horses for 70*l.* as part of the amount of the acceptance. But, to accommodate the bankrupt, the defendant allowed him to run the horses in his coach for nearly six weeks; at the expiration of which period they were delivered to the defendant, who paid the bill when it became due. The jury found that the sale of the horses was bona fide, and returned a verdict for the defendant. It was held that the transaction was not protected by the 82nd section of the 6 Geo. 4, c. 16, as it only amounted to a set-off of the price of the horses against a by-gone debt, and was not a payment by the bankrupt within the meaning of the act: and the Court directed a new trial.

house: if he strictly confined himself to the mere trade of an inn-keeper, he was not liable to the bankrupt laws (*a*); but, if he sold goods to persons other than guests, then he was (*b*). Here, the facts stated shew that the bankrupt did not confine the sale of the commodities which he bought to the persons who put their horses under his care in the livery stables, but sold indiscriminately to all that wanted them.

The second question is, whether the transaction in question between the defendant and the bankrupt is protected by the 82nd section of the statute 6 Geo. 4, c. 16. That section provides for two different states of fact—one, a payment really and bonâ fide made *by* the bankrupt before the date and issuing of the commission—the other, a payment really and bonâ fide made *to* the bankrupt before the date and issuing of the commission. Cases have been referred to in the course of the argument, in which it has been held, that, where there has been a sale of goods by the bankrupt and an actual payment of the price *to* him, before the issuing of the commission, the assignees are not entitled to recover back the goods without restoring the price paid for them. Now, I perfectly agree in the propriety and justice of those decisions, because it seems to me that it would be impossible to give effect to the payment without validating the sale. Here, however, there has been no *payment* to the bankrupt, but a *loan*, for which the bankrupt has given a security. The case, therefore, falls within the express words of the 81st section; it is a conveyance by or a contract with the bankrupt before his bankruptcy; and the only question is, whether it was made and entered into more than two calendar months before the date and issuing of the fiat against him. It is a conveyance of his property of which

(*a*) See *Saunderson* v. *Bowles*, 4 Burr. 2064.

(*b*) See *Holme* v. *Bough*, 1 Selw. N. P. 181; *Putman* v. *Vaughan*, 1 Term Rep. 572.

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the bankrupt retained the possession, and was to retain it until the month of March following. Without entering into any discussion which might arise upon this state of facts, it is sufficient to say that this was a transaction intended to be protected, if protected at all, by the 81st section; and that it does not fall within the protection because it took place *within* two calendar months before the issuing of the fiat. I therefore think the plaintiff is entitled to recover.

Mr. Justice GASELEE.—I am of the same opinion. The general trading of the bankrupt is clear, from the statement of the case. If the bankrupt had conducted his business strictly and properly as a livery-stable keeper—merely supplying hay, straw, and corn to the horses standing at livery in his stables—he would clearly not have been subject to the bankrupt laws: but his trading was not so limited. The case is, therefore, not like that of a farmer, who is held not liable to the bankrupt law by reason of the sale of surplus horses or stock that had been kept by him for farming purposes only.

With respect to the second point—I take it this cannot be held to be a case of payment. I understand a payment to be a delivery over of money in discharge of an antecedent debt. There was no antecedent debt here; it was a mere loan. I therefore think that the transaction does not fall within the protection of the 82nd section of the bankrupt act.

Mr. Justice BOSANQUET.—I am of the same opinion upon both points. It appears to me that the terms of the special case entirely conclude the first point. It finds that the bankrupt "was in the habit of buying hay, straw, and oats, which he supplied to the horses standing in the mews, *or sold to any person who wanted them.*" If he sold them thus indiscriminately, the quantities in which he sold them

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will not be material (*a*). The additional statement—"as is done in all livery stables"—does not seem to me to control or limit the generality of the former words.

As to the other question, it appears to me to be impossible to contend that this transaction which took place on the 5th September, 1832, can be protected under either the 81st or 82nd sections of the 6 Geo. 4, c. 16. It is clearly a transaction falling within the 81st section; and, if the transaction had taken place more than two calendar months before the issuing of the fiat, it would have been protected: but this transaction took place *within* the two months. It is then contended that it is protected as a payment within the meaning of the 82nd section. How is it possible to contend that the delivery of the money by the defendant to the bankrupt amounted to a payment, the goods, the supposed consideration for the advance, remaining in the possession of the bankrupt? It appears to me that it was a mere loan to the bankrupt subsequently to the act of bankruptcy. The security was given after the act of bankruptcy, and the property comprised in the security left in the possession of the bankrupt up to the time of the issuing of the fiat. I therefore think that the transaction in question is not protected by either of the clauses referred to, and consequently that the plaintiff is entitled to retain the verdict found for him by the jury.

Mr. Justice ALDERSON.—I am of the same opinion. The facts stated in the case establish that the bankrupt sold goods which he had previously bought, to any person who applied for them; and, under these circumstances, as the trading has been found by the jury, the Court agree with them in the conclusion they have drawn from the premises.

With respect to the second point—The transaction

(*a*) See *Newland* v. *Bell*, Holt, 221.

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does not fall within the 82nd section of the 6 Geo. 4, c. 16. I construe that section not without reference to the 81st. The legislature meant to provide for and protect two different species of transactions—first, conveyances by and contracts made with the bankrupt more than two months before the date and issuing of the commission—secondly, payments really and bona fide made by or to the bankrupt, without notice, at *any time* before the date and issuing of the commission. Now, if a payment made to a bankrupt be construed to be a contract made with the bankrupt, this absurd consequence will follow, viz. that the same provision in two successive sections would have two different operations. In the one case, the transaction would be protected where it took place more than two months before the issuing of the fiat; and, in the other, it would be protected if it took place *at any time before the issuing of the fiat*. It therefore seems to me that that which is included in the 81st section is excluded from the 82nd; and that this case falls within the 81st section. The bankrupt, it appears, received a loan of 2,700*l.* upon the security of property that was to remain in his own possession, and the money was to be repaid in the month of March following. How can this be construed to be any other than a contract made with the bankrupt, or a conveyance by him? And if it be a conveyance by or a contract made with the bankrupt, it is clearly within the words of the 81st section; and, if within the 81st, it cannot be also within the 82nd section. The cases cited, of payments made to the bankrupt, do not apparently fall within the very letter of the act; but, construing the 82nd section with reference to the law as it stood before the passing of the 6 Geo. 4, c. 16, they obviously have been decided on a correct principle. The statute 19 Geo. 2, c. 32, appears to me to explain the meaning of the words "payments made by or to any bankrupt" in the 82nd section of the existing bankrupt law. That act

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recites that "whereas many persons within the description of and liable to the statutes concerning bankrupts frequently commit secret acts of bankruptcy unknown to their creditors and other persons with whom in the course of trade they have dealings and transactions, and after the committing thereof continue to appear publicly and carry on their trade and dealings, by buying and selling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if they were solvent persons and had not become bankrupts: and whereas the permitting such secret acts of bankruptcy to avoid and defeat payments really and bonâ fide made in the cases and under the circumstances above mentioned, where the persons receiving the same had not notice of or were privy to such persons having committed any act of bankruptcy, will be a great discouragement to trade and commerce, and a prejudice to credit in general." It then proceeds to enact "That no person who is or shall be really and bonâ fide a creditor of any bankrupt for or in respect of goods really and bonâ fide sold to such bankrupt, or for or in respect of any bill or bills of exchange really and bonâ fide drawn, negotiated, or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate any money which before the suing forth of such commission was really and bona fide and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances." The legislature, in protecting the payment, obviously contemplated the sale itself as having been pro-

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tected under the prior statute of 1 Jac. 1 (*a*). If that be so, it explains what is meant in the 82nd section of the 6 Geo. 4, c. 16, by validating payments really and bona fide made to the bankrupt in the usual and ordinary course of business. And it is upon that principle, as it appears to me, that the decisions cited by my brother Talfourd proceeded.

Judgment for the plaintiff.

(*a*) 1 Jac. 1, c. 15, s. 14.

Monday, Nov. 11*th.*

The Court discharged a defendant out of custody on entering a common appearance, the writ of capias not describing the cause of action *strictly* according to the form prescribed by the statute 2 Will. 4, c. 39, s. 4, sched. No. 4.

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MR. Serjeant *Bompas*, on a former day, obtained a rule nisi that the bail-bond given by the defendant on his arrest at the suit of the plaintiff in this cause, might be cancelled, on his entering a common appearance, on the ground that the cause of action was misdescribed in the writ as "an action of trespass on the case," instead of "an action on promises," as required by the schedule No. 4, annexed to the uniformity of process act, 2 Will. 4, c. 39, s. 4.

Mr. Serjeant *Wilde* and Mr. Serjeant *Stephen* now shewed cause.—If the Court decide in favour of this application, the plaintiff will lose the security which the law has given him in the person of his debtor, in consequence of the mere accidental circumstance of the attorney's clerk having omitted two words—words that do not in any degree apprise the defendant either of the cause or of the form of the action that he is called upon to answer. In the form given by the act, he is told that he is sued in "an action on promises:" it may be debt, it may be assumpsit:

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with respect to the ground of action it affords no further information than do the words the plaintiff has here made use of. The legislature never could have intended that this part of the act should be imperatively adhered to: it could never have been intended to alter the legal description of the action. In the form given in the schedule No. 3, for the writ of distringas, the words are—"in a plea of trespass on the case, *or* debt, &c., as the case may be." No precise form of expression is given for an action of trespass or of covenant. In *King* v. *Skiffington* (*a*), the form of the motion was, to set aside the proceedings on the ground of a variance. The language of Mr. Justice Bayley in that case assumes that an action upon promises is not an action on the case; which is contrary to the law. He says: "The act gives a form of writ which particularly specifies the species of action, as, on promises, or, in debt, &c., as the case may be. When you say in case, you may mean one of two forms of action, and therefore do not specify the form of action with sufficient precision."

Mr. Serjeant *Bompas*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I think the more safe and convenient course for the interests of the public will be, to give to the words of the statute and the forms thereby prescribed a strict construction; for, private convenience must always give way to that of the public; and it will be more convenient for the public that a plain and intelligible rule be laid down, capable of being interpreted by any individual. The main object of the act was, that the process of all the Courts should be uniform. The 4th section enacts, "that, in all such (personal) actions wherein

(*a*) 1 Dowl. P. C. 686.

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it shall be intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet Prison, the process shall be by writ of capias, according to the form contained in the schedule to the act annexed, and marked No. 4." The form referred to commands the sheriff or other officer to take the defendant and him safely keep until he shall have given bail, or made deposit according to law, "in an action on promises (*or*, of debt, &c.) at the suit of A. B., or until, &c." In the present instance, the plaintiff has caused the defendant to be arrested upon a capias in which this form has not been pursued, but the action is described as "an action of trespass on the case." Now, it is well known that "trespass on the case" is nomen generalis, and that "on promises" limits the description to the particular species of action. It may be, that, inasmuch as the two forms of action specifically designated in the act "an action on promises" and "an action of debt," are the only ones in which an arrest could lawfully be made without leave of the Court, the "&c." means to embrace all other forms of action in which an arrest may be made with leave. How, in this case, are we to say that the plaintiff has not arrested the defendant in an action of trespass for a tort? I am of opinion, that, the words of the act being express, the defendant is entitled to the remedy he seeks.

Mr. Justice GASELEE.—After what has been passing for some months with the view of rendering the practice of the different Courts of law in Westminster-Hall uniform and consistent, I do not feel disposed on this occasion to differ from the rest of the Court; though I am of opinion that, if this were res integra, the motion ought not to succeed. The defendant could not be misled or put to any inconvenience by the description of the action in the capias. It is true that it commands the sheriff to take the

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defendant in "an action of trespass on the case:" but, on the back of the writ there is the indorsement of the amount of the plaintiff's claim for the *debt* and costs, pursuant to the rule of Hilary Term, 2 Will. 4 (*a*); so that it was impossible that the erroneous description of the action in the process could deceive or mislead any body. It certainly may lead to unpleasant consequences to relax the rule which holds it to be necessary that the forms prescribed to be used in proceedings in Courts of justice should be strictly observed.

Mr. Justice BOSANQUET.—I agree with my Lord Chief Justice in the expediency of requiring the process to be in the precise form prescribed by the schedule annexed to the 2 Will. 4, c. 39. The interests of the public require that these forms should be strictly adhered to. To permit any deviations would necessarily introduce nice distinctions, and lead to great litigation. The process used on the present occasion essentially departs from the prescribed form. It is material that the nature of the action should specifically appear on the face of the writ, and that the particular description pointed out by the act should in all cases be adopted. If we were to enter into a discussion as to whether or not the expressions used in the particular case were equivalent to those in the act, we should give rise to innumerable questions.

Mr. Justice ALDERSON.—I am of the same opinion. It would occasion to the public great and useless expense and litigation, to hold that the forms prescribed by acts of parliament need not be strictly adhered to. If the decision in such cases as this is to turn upon whether or not the party has been deceived or misled by the particular expressions used, we shall have affidavits on both sides as to the fact. No doubt, this is a case of hardship upon

(*a*) Reg. 11. Vide ante, Vol. 1, p. 431; 8 Bing. 305.

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the plaintiff. But then, is it not wiser and better to adhere to a general rule that is intelligible to all men, than to introduce exceptions? The adoption of this course will tend to produce the desired uniformity in the practice of the different Courts; whereas an opposite course would leave no certain rule for the guidance of the suitors.

Rule absolute.

Saturday, Nov. 23rd.

The defendant was arrested under a writ of capias, and discharged out of custody on the ground of a defect in the process. At the time of making the rule absolute for discharging the defendant, the Court gave the plaintiff leave to arrest him again. The defendant took out a side-bar rule to discontinue the first writ, and paid the defendant's costs thereon:—*Held*, first, that the discontinuance of the writ (that being the only step taken in the cause) was a discontinuance of the action—secondly, that it was not necessary to indorse upon the second writ, that the defendant therein was arrested by leave of the Court—thirdly, that it was not necessary to file a second affidavit of debt on issuing the second writ.

The plaintiff having subsequently obtained the leave of the Court to arrest the defendant a second time, and having also taken out a side-bar rule to discontinue, and the costs thereon having been taxed and paid, and a receipt given for such costs by the defendant's attorney, as for costs of discontinuance of the action, the defendant was again arrested, and gave a bail-bond: whereupon—

Mr. Serjeant *Bompas* moved for a rule calling on the plaintiff to shew cause why the last-mentioned bail-bond should not be delivered up to be cancelled, on the grounds—first, that there was no indorsement on the back of the writ upon which the second arrest was made, to shew that such second arrest was made by leave of the Court or order of a Judge—secondly, that there had not been any legal discontinuance of the former suit—thirdly, that no new affidavit of debt had been made and filed to warrant the issuing of the second writ.—The rule to discontinue is for a discontinuance of the writ only: that is not enough; it is no discontinuance of the action; particularly as the parties had been brought into Court in pursuance of the former rule.—Formerly, it was held that defendants might be held to bail in actions of trover and detinue without a Judge's order—*Catlin* v. *Catlin* (*a*), *Emerson* v. *Hawkins* (*b*). But, in

(*a*) Stra. 1192; 1 Wils. 23. (*b*) 1 Wils. 336.

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Hilary Term, 48 Geo. 3, a rule was made by all the Courts, that "no person can be held to special bail in an action of trover or detinue, without an order made for that purpose by the Lord Chief Justice or one of the Judges (*a*)." Then came the statute 2 Will. 4, c. 39, s. 4, and the rule of Court made thereon (*b*), which requires that, where a party is held to bail in pursuance of a Judge's order, the indorsement on the back of the writ shall be as follows:—"Bail for ——— *l.*, by order of ———," naming the Judge making the order. The same indorsement had before been required in trover and detinue. Here, the order of the Court was the sole authority upon which the second arrest could be made, and therefore such order should have appeared on the back of the writ.—Then, there has been no such discontinuance of the first action as will entitle the plaintiff again to hold the defendant to bail.—And the practice of the Court requires that a new affidavit should be filed with the filacer before a second writ issues for the same cause of action.

The Court were unanimously of opinion that the first objection was untenable, no such indorsement as that suggested being necessary where the cause of action was one for which the plaintiff had a right to hold the defendant to bail without a Judge's order; and that there had been a sufficient discontinuance of the action to warrant the second arrest. There being, however, some doubt upon the last point, they stayed granting the rule until they could have an opportunity of consulting the other Judges, in order that an uniform rule of practice in this respect might be laid down in all the Courts; and also of obtaining the officer's report as to the practice that had hitherto prevailed in this Court.

(*a*) Tidd's Practice, 9th edit. 172.

(*b*) Reg. VII. Michaelmas Term, 3 Will. 4—ante, Vol. 2, p. 331.

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The filacer having reported to the Court that it had never been the practice to make a new affidavit, where the second writ was issued (as in the present case) by the officer who issued the first—

Mr. Serjeant *Wilde* and Mr. Serjeant *Stephen* now shewed cause.—To warrant an arrest for debt, the statute 12 Geo. 1, c. 29, s. 2 (*a*), requires that an affidavit be made and filed of the cause of action: this affidavit is not made in any cause; it precedes the cause. Here, a positive affidavit of the cause of action for which the defendant was arrested has been made before and filed with the officer by whom the process was issued: all the requisites of the statute have therefore been complied with. But it is objected that the affidavit, having been made use of as the foundation of the process in the former action, was functus officio, and that a new affidavit ought to have been filed. There is no express rule upon the subject to be found in any of the books: but it appears that the constant practice has been that which has been adopted here. In all the cases that at all approximate in principle to the present, the question has been whether or not the affidavit has been made and filed with the proper officer—where the second writ has issued into a different county from the first. In *Puckford* v. *Maxwell* (*b*), A. having been arrested at the suit of B., gave him a draft for part of the demand, and agreed to settle the remainder in a few days; the draft was dishonoured; on which B. again arrested him on the same affidavit; and the Court held the second arrest regular. In *Boyd* v. *Durand* (*c*) it was held, that, where a plaintiff proceeds by a second original capias instead of a testatum capias, a second affidavit to hold to bail is not necessary. In *Baker* v. *Allen* (*d*), it was held

(*a*) Amended by the 5 Geo. 2, c. 27, and made perpetual by the 21 Geo. 2, c. 3.

(*b*) 6 Term Rep. 52; S. C. nom. *Penfold* v. *Maxwell*, 1 Chit. Rep. 275, n.

(*c*) 2 Taunt. 161.

(*d*) 7 Barn. & Cress. 526; S. C. 1 Man. & Ryl. 232.

that, a latitat being a continuance of a bill of Middlesex, it is sufficient, to satisfy the statute 12 Geo. 1, that an office copy of the affidavit sworn in the bill of Middlesex office be filed at the office of the signer of the writs previous to issuing the latitat, without swearing a fresh affidavit. [Mr. Justice *Bosanquet* referred to *Anderson* v. *Hayman* (*a*). There, on an affidavit of debt sworn before and filed with the filacer for Devon, a capias ad respondendum issued to the sheriff of that county against the defendant, who not being found there, an office copy of such affidavit was filed with the filacer for London, upon which another capias issued, directed to the sheriffs of London, under which the defendant was arrested: it was held that this was irregular, as an affidavit should have been sworn before the filacer for London.] In *Anderson* v. *Hayman*, the two writs were issued by different officers: here, both the writs were issued into London. The object of the statute is that the officer who issues the process may have in his possession the authority for indorsing on the writ the sum for which the defendant is to be held to bail. It cannot be doubted that perjury might be assigned upon the affidavit used in the present case: nor can it be said that the affidavit has been used for a purpose foreign from the original design with which it is made.

Mr. Serjeant *Bompas*, in support of his rule.—The first action having been put an end to, the plaintiff cannot regularly commence another upon the same process. The statute requires the oath of a subsisting debt *at the time of suing out the process—Kelly* v. *Devereux* (*b*). And there are many cases to shew that a party cannot introduce two causes of action or two or more defendants

(*a*) 2 J. B. Moore, 192. (*b*) 1 Wilson, 339.

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into one affidavit—*Crooke* v. *Davis* (*a*), *Gilby* v. *Lockyer* (*b*), *Holland* v. *Johnson* (*c*), and *Holland* v. *Richards* (*d*). Where a party is held to bail under a Judge's order, the order is lodged with the filacer. Here, no Judge's order is lodged with the filacer; therefore there is nothing to warrant the issuing of the second writ. The fact of there being any affidavit at all in existence, can only be made to appear to the Court upon affidavit. In *Dalton* v. *Barnes* (*e*), it was admitted that the affidavit was not sworn before the proper officer, but it was contended that the practice was, for the filacer, upon transmitting to him either the original affidavit or an office copy of it, to issue his writ: but the Court said "that such could not be the practice, for that an affidavit made for one specific object could not be transferred to another; and perjury could not be assigned on the office copy." Here, the affidavit has been used for a specific object, and therefore is functus officio. The ground upon which the decision in *Baker* v. *Allen* proceeded was, that the second process was a mere *continuation of the first*, and therefore no new affidavit could be necessary. In *Archer* v. *Champneys*, the Court said (*f*): "The general rule is, that a defendant cannot be re-arrested after a discontinuance, nonsuit, or nonpros, unless the former action was founded on a mistake, which mistake would tend to shew that the second arrest was not vexatious. But it is not only necessary for the plaintiff to shew that he discontinued or nonprossed the former action on the ground of misconception or mistake, but that the second arrest was not vexatious; and if he does not do this, the Court will infer that it was so."

Lord Chief Justice TINDAL.—I am of opinion that the

(*a*) 5 Burr. 2690.
(*b*) Doug. 217.
(*c*) 4 Term Rep. 695.
(*d*) 4 Term Rep. 697, n.
(*e*) 1 Mau. & Selw. 230.
(*f*) 3 J. B. Moore, 608.

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second arrest of the defendant in this cause was not irregular, and therefore that this rule ought to be discharged. Three objections have been taken to the proceedings—first, that there has not in effect been any legal discontinuance of the former suit—secondly, that there appears no indorsement on the back of the second writ to shew that the process was issued under the authority of the Court—thirdly, that the second writ was issued without an affidavit being filed of the cause of action.

Now, with respect to the first objection, it is admitted that there has been a discontinuance of the first writ; and I am unable in this respect to discover any rational distinction between a discontinuance of the writ and a discontinuance of the suit. But the case does not rest there. The costs of the first action have been taxed and paid, and a receipt given by the defendant's attorney whereby he admits that he has received from the plaintiff the costs of the discontinuance of that action. The rule that the Courts ordinarily lay down upon the subject may be, that, after a discontinuance, the defendant shall not be again held to bail for the same cause without leave of the Court: but that rule is not inflexible. In *Olmius* v. *Delany* (*a*), "in debt on bond for 900*l.*, the defendant put in bail, who justified in Court and were allowed. The plaintiff, finding they were forsworn and worth nothing, discontinued; but before he had done so he arrested the defendant in a second action, and held him to bail. The defendant moved to be discharged on common bail, and obtained a rule to shew cause; when the whole villainy appearing, the Court discharged the rule, and said the plaintiff was right in laying hold of him as he did; for, had he discontinued before, the defendant would probably have run away: and therefore ordered he should be held to special bail." The Court there, looking at the

(*a*) Strange, 1216.

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substantial justice of the case, held the second arrest to be valid. On the present occasion, it is enough for us to say that the act of the defendant's attorney in giving a receipt as for costs of a discontinuance of the action, puts an end to this objection.

As to the second point, I am of opinion that no such indorsement as that suggested was necessary in this case, and that all the indorsements that are essential do appear on the back of this writ. It is contended, that, the second arrest having been made under the authority of the Court, that fact should have been indorsed on the writ. The first answer that suggests itself to me is, that no such form of indorsement is given by the statute 2 Will. 4, c. 39; and again, the late rule of Court, which provides, that, where a party is held to bail upon a Judge's order, the indorsement there given must be made on the writ, does not go on to say, that, where a second arrest has taken place by leave of the Court, the order for that purpose must be indorsed on the writ, which I cannot help thinking it would have done if such had been the intention.

The third and main question is, whether, there having been an affidavit of the cause of action duly made and filed before the issuing of the first writ, and that writ having been discontinued by the plaintiff, it became necessary to file a second affidavit, to support the second arrest. Let us look at the words of the statute 12 Geo. 1, c. 29, which alone makes any affidavit necessary. That statute enacts "that, in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.* or upwards, affidavit shall be made and filed of such cause of action; which affidavit may be made before any Judge or commissioner of the Court out of which such process shall issue authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy, &c." Looking at these words, it seems to me that all has been done in the present case that is required by the act.

It is admitted that the debt exceeds the sum for which a party may now by law be held to bail. An affidavit has been filed of the cause of action. There is no pretence for saying that the cause of action for which the first writ was sued out was not the same as that for which the second has issued: and the two writs were issued by the same officer. There is, therefore, within all the requisites of the statute, an affidavit of the cause of action duly made and filed. It has been said that perjury could not be assigned upon the affidavit so made and filed, in respect of the arrest under the second writ. But that does not seem to me to be a necessary consequence; for, if the plaintiff has availed himself of that affidavit to found upon it his right to hold the plaintiff to bail in the second action, he would be estopped from denying that it was an affidavit made in that cause: and, although it may be said that the affidavit might have been true at the time it was made, but not so at the time of the issuing the second writ, the same objection might arise in every case where there is an interval of time between the making of the affidavit and the issuing of the writ. In *Boyd* v. *Durand*, it was held, that, if a plaintiff proceed by a second original capias, instead of a testatum capias, a second affidavit to hold to bail is not requisite. The same suggestion might have been made in that case that has been made here—that the plaintiff sought to use for one purpose an affidavit that had originally been intended and had actually been used for another: but the answer is, that both the affidavit and the arrest are for the *same* cause of action. Upon inquiry, we find that the practice in this Court has always been in accordance with the course adopted here; and the opinions of the Judges of the other Courts corroborate our own, that, in this case, a second affidavit was unnecessary.

Mr. Justice GASELEE.—The weight of authorities and

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the understood practice of the Court as reported to us by our officers, are decisive that no second affidavit of debt was necessary in this case.—With respect to the indorsement, the form of the writ of capias annexed to the statute 2 Will. 4, c. 39, provides two forms of indorsement—"Bail for ——*l.*, by affidavit," or "Bail for ——*l.*, by order of ———," naming the Judge making the order. The object of the indorsement is, that the sheriff may know for what sum he is to take bail.—The only other point is, whether the former action was discontinued by a proper rule; it being a rule to discontinue the writ of capias, instead of the action. But, upon consideration, inasmuch as the writ was the only step that had been taken in the cause, and the defendant has been paid the costs *of the cause*, and has admitted by the receipt that he has had all the benefit of a legal discontinuance of the suit, I think there is no ground for the objection. Besides, we find it laid down that it is not absolutely necessary that there should be a discontinuance of the former suit before the defendant is again held to bail; the Court may without it allow a second arrest: and I think this a proper case for the exercise of that discretion if it were necessary.

Mr. Justice BOSANQUET.—I am of opinion that it is not open to the defendant to object to the form of the rule to discontinue the writ, which was the only proceeding in the cause. The costs appear to have been taxed and paid, and a receipt given for the amount as for costs of a discontinuance of the action. Independently of which, we find it laid down not to be absolutely necessary that the former suit should be discontinued before a second arrest takes place. If any case can arise in which a discontinuance may be dispensed with, it surely must be where, as in this case, the defendant has received the costs of the former suit upon the footing of a legal discontinuance.

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Upon the occasion of the former motion, sufficient appeared to the Court to induce them to allow the plaintiff to arrest the defendant a second time: and it can hardly be contended that the leave of the Court is not equivalent to an order of a Judge. Where the affidavit of debt is not the proceeding upon which the defendant is held to bail, the indorsement must state the arrest to have been made under the authority of a Judge's order. Here, however, the arrest is by affidavit: the amount of the debt is ascertained solely by the oath of the party. When a Judge makes an order for holding a defendant to bail, he directs in what sum he is to be held to bail; and the indorsement on the writ is made according to the sum mentioned in the order. But here the order is of quite a different description. The statute clearly did not contemplate two indorsements: and the indorsement shewing that the arrest was by affidavit was certainly necessary. This case falls under the rule of Hilary Term, 2 Will. 4, by which parties are restrained from proceeding to a second arrest for the same cause of action, except by leave of the Court. No indorsement of such order for a second arrest is necessary.

Then, is this an arrest contrary to the act of parliament or to the practice of the Court, or contrary to the authorities? The act merely requires that an affidavit shall be made and filed of the cause of action. If the affidavit is not filed with the proper officer, it is the same as if none had been made. *Boyd* v. *Durand* seems to me to be decisive. If the two arrests in this case had taken place in different counties, and the officers issuing the process had been different, the objection might have been well founded. There is no case to be found that at all contravenes the authority of *Boyd* v. *Durand;* and nothing that at all touches it, save that dictum of the Court in *Dalton* v. *Barnes*, suggesting that "an affidavit made for one specific object could not be transferred to another." The

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second writ, therefore, having been issued by the same officer who issued the first, the arrest thereon was clearly regular, and (as we are informed by our officer) according to the established practice of the Court.

Mr. Justice ALDERSON.—The objection as to the non-indorsement of the order of the Court authorizing the second arrest in this case, is clearly not well founded. The statute 2 Will. 4, c. 39, contains a schedule of forms that are to be observed strictly. These forms direct certain indorsements to be made upon the process. We must look to the nature of these indorsements and to the purposes for which they are required. The first—"Bail for ——*l.*, by affidavit"—obviously refers to the provision of the statute 12 Geo. 1, c. 29, which requires an affidavit of the cause of action to be made and filed before bailable process is issued. The only object therefore of the indorsement is, to continue to defendants the same protection that had before existed. The first indorsement applies only to those cases where a party may be arrested without a Judge's order. But, where the cause of action is one for which a party cannot be held to bail without leave of the Court or the order of a Judge, the second indorsement is requisite—"Bail for ——*l.*, by order of ——," naming the Judge who makes the order. In the one case the affidavit, in the other the Judge's order, enables the officer who issues the process to indorse thereon, for the information of the sheriff, the sum for which bail is to be taken. Here, the officer would not have been justified in omitting the first indorsement; and he could not add the second also.

With respect to the other point—It appears to me that all that the act of parliament requires is, that there shall be on the files of the Court an affidavit that a cause of action exists for which the party is arrestable. The statute restrains the previous power of a plaintiff to arrest his

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debtor. How can we say in the present case that there was any reason, at the time the second arrest took place, to alter the oath originally taken, because the former action had been discontinued? And how can we say that the second writ has issued without an affidavit of the cause of action?

Rule discharged.

PACK *v.* ALEXANDER.

Saturday, Nov. 9th.

Semble, that the delivery of a letter to the bell-man is a delivery to the post-office.

THE defendant, at the request of the plaintiff, inclosed a £50 bank-note in a letter to be sent by the post. The letter never reached its destination. The plaintiff now sought to recover the value of the note. At the trial it was proved that the letter containing the note was delivered by a clerk of the defendant to the bell-man, by whom it was put into his bag. The latter also proved that the letter bags are delivered to the postmen, locked, at the post-office, and that a letter once put into the bag, could not, by reason of the construction of the aperture, be abstracted without the aid of the key. The jury found that there was no evidence of the letter having ever reached the post office, and accordingly returned a verdict for the plaintiff.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence.—He cited *Warwicke* v. *Noakes* (*a*), and *Hawkins* v. *Rutt* (*b*).

Mr. Serjeant *Coleridge* now shewed cause.—When an

(*a*) Peake's N. P. C. 67. (*b*) Peake's N. P. C. 186.

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agent is desired to send money to his principal by the post, it must be understood that the latter intended it to be remitted in the most proper and secure manner, viz. by a post-office order. In the present case due diligence and caution have not been observed in the conveyance of the letter to the post-office. [Lord Chief Justice *Tindal*.—What degree of diligence would you expect from a bailee of this sort: he is not a bailee for hire. Is it not enough that he used the same degree of caution that he would have employed in his own case?] The question was one purely for the consideration of the jury. It was for them to say whether or not the letter containing the note had ever reached the post-office.

PER CURIAM.—The Court are clearly of opinion that the verdict was against evidence, and therefore the rule must be made absolute.

Rule absolute, on payment of costs.

Thursday, Nov. 14th.

HUNT *v.* COLSON.

The plaintiff was employed by the Highgate archway company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do:—*Held*, that these circumstances did not constitute the plaintiff a *tenant* of the company; and therefore that he could not maintain trespass against their agent for pulling down the toll-house.

THIS was an action of trespass for breaking and entering the plaintiff's cottage and destroying his furniture. The defendant was agent to the Highgate Archway Company; the plaintiff was a labourer who had been employed to collect toll upon a bye-road under the management of the company, for which purpose he had been put into the cottage in question, and one shilling per week *deducted*

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from his wages by way of rent. Subsequently, the company, having ceased to collect toll at the spot in question, had discharged the plaintiff from their service, and contracted to sell the land upon which the cottage stood to another person. The plaintiff accordingly received notice to quit, to which he assented; but he afterwards refused to deliver up possession, whereupon the defendant, as agent of the company, proceeded to demolish the cottage; which was the trespass complained of. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after the last term. For the defendant it was submitted—first, that, as the plaintiff had merely occupied the cottage as the servant of the company, he was bound to quit when he left their employ—secondly, that, even if he could under the circumstances be deemed a tenant to the company, he was in no condition to maintain the present action, being himself a trespasser by reason of the notices to quit and of his promises to give up the premises. His lordship was of opinion that the deduction of one shilling per week for rent out of the wages of the plaintiff constituted him a tenant to the company. The jury returned a verdict for the plaintiff—damages 15*l.*

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground of misdirection.—He cited *Bertie* v. *Beaumont* (*a*), *Taunton* v. *Costar* (*b*), *Turner* v. *Meymott* (*c*), and *Butcher* v. *Butcher* (*d*). [Mr. Justice *Alderson* referred to *The King* v. *Cheshunt* (*e*). There, a pauper employed as a labourer by the Board of Ordnance, having previously occupied a house at an annual rent of

(*a*) 16 East, 33.
(*b*) 7 Term Rep. 431.
(*c*) 7 J. B. Moore, 574; S. C. 1 Bing. 158.
(*d*) 7 Barn. & Cress. 399; 1 Man. & Ryl. 220.
(*e*) 1 Barn. & Ald. 473.

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7*l.*, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of two shillings, which was deducted out of his wages; and during such last occupation he also occupied a shop (the shop and house together being of the annual value of 10*l.*), and upon his dismissal from his employment he gave up possession of the house as required. It was held that his last occupation of the house was not as tenant, but as servant, and that no settlement was thereby gained.]

Mr. Serjeant *Storks* now shewed cause.—There was clearly a subsisting tenancy under the company by the plaintiff at the time of the trespass complained of: the latter was in possession, paying rent, receiving notice to quit; and he continued in possession long after he had ceased to be in the service of the company. At all events, the plaintiff had the right of possession as against the company, they having parted with their interest in the premises. [Mr. Justice *Alderson*.—The possession of the plaintiff was undoubtedly lawful until put an end to by a notice to go out: but he was not entitled to the same notice to quit that a tenant would be entitled to require.] In *The King* v. *Cheshunt*, there clearly was no tenancy, the house had always accompanied the service. So, in *Rex* v. *The Inhabitants of Lakenheath* (*a*), the occupation of the house by the school-master was part of his remuneration, and no separate holding: whereas, here, the service and the tenancy were perfectly distinct.

Lord Chief Justice TINDAL.—I must confess that if the facts had presented themselves to my mind at Nisi Prius in the same light that they now do, I should have left it to the jury to consider whether the tenancy had existed

(*a*) 1 Barn. & Cress. 531.

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after the determination of the service. There was no evidence of any rent having been paid by the plaintiff after he had ceased to collect the toll. If it had appeared that the company had actually parted with their interest in the premises to a third person, and that the plaintiff was in with the permission of that person, a different question might have arisen. But there was no such evidence; on the contrary, it appeared that the purchaser was not to receive possession until the company had succeeded in expelling the plaintiff. I therefore think the rule must be made absolute.

The rest of the Court concurring—

Rule absolute.

MALLAM *v.* ARDEN and Others.

Saturday, Nov. 16th.

The plaintiff occupied a house as tenant to the defendant, under a demise for a year, at a rent payable quarterly, *or half quarterly if required.* The first year of the tenancy had elapsed, and the rent had always been paid *quarterly.* The defendant afterwards, without any previous demand or notice to the tenant, distrained for a half quarter:—*Held*, that the distress was illegal.

TRESPASS for breaking and entering the plaintiff's house, &c. At the trial before Lord Chief Justice Tindal, at the Sittings at Westminster after last term, a verdict was found for the plaintiff, with nominal damages, upon the following facts:—The plaintiff occupied a house as tenant to Mrs. Arden, one of the defendants, under a demise for a year certain, at a rent payable quarterly, or *half-quarterly if required*, with a stipulation for six months' legal notice to quit. The first year of the tenancy had elapsed, and the rent had always been paid *quarterly;* until the landlady, without any previous demand or notice to the plaintiff, distrained for a half quarter's rent then accrued.

Mr. Serjeant *Talfourd*, on a former day, in pursuance of leave reserved for that purpose, obtained a rule nisi

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that this verdict might be set aside and a nonsuit entered. —He referred to *Cranley* v. *Kingswell* (*a*), where it was held that the lord might distrain for rent service without a personal demand; and to *Doe* d. *Scholefield* v. *Alexander* (*b*), where, upon a lease reserving rent payable quarterly, with a proviso that if the rent be in arrear twenty-one days next after the day of payment, being lawfully demanded, the lessor might re-enter; it was held, that, five quarters being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand. He also cited *Kind* v. *Ammery* (*c*) and *Wentworth's* case (*d*), and submitted, that, if any requisition or notice on the part of the landlady that the rent should be paid at the half quarter, were necessary in this case, the distress itself amounted to a requisition. [Lord Chief Justice *Tindal*.—The difficulty seems to me to be, that the landlady had already made her election to receive the rent quarterly.]

Mr. Serjeant *Wilde* now shewed cause.—Undoubtedly, in ordinary cases, a distress is a demand; for, the tenant knows when the rent is due. Here, however, the year for which the demise was originally made had elapsed, and the landlady had during that year and afterwards received the rent quarterly: can she, having thus declared her election, now claim to be paid half quarterly—at all events without some notice to the tenant? A tenant is always supposed to be in default before he can be liable to a distress. The landlord's right of distress arises on the supposition that no demand is requisite; as, where the period of payment is defined. But, where anything remains to be done to give an intimation to the tenant when his rent is to be paid, there must be a demand. All the authorities upon

(*a*) Hobart, 207.
(*b*) 2 Mau. & Selw. 525.
(*c*) Hutton, 23.
(*d*) Hutton, 42.

the subject will be found in Bacon's Abridgment (*a*), where after reference to cases in which a distress may be made without a previous demand of the rent, and stating certain exceptions to the rule, the learned editors observe—"Another exception is, where the rent is payable at a place off the land, with a clause that if the rent be behind, being lawfully demanded at the place off the land, or with a clause that if the rent being lawfully demanded of the person that is to pay it, that then he may distrain; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand; because here the distress and demand being not one complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress; for, the distress is a matter of agreement between the parties, not of common right, and therefore must be used in the manner that it is given." [The Court here called upon—

Mr. Serjeant *Talfourd* to support his rule.—The learned Serjeant recapitulated the arguments urged by him on moving for the rule.

Lord Chief Justice TINDAL.—The question in this case arises upon the construction of an agreement between the plaintiff and his landlady, whereby the latter demised to the former the premises upon which the distress was taken, for one year, such tenancy to be determinable upon six months' legal notice to quit. The rent is reserved payable quarterly, or half quarterly, at the option of the landlady. The reasonable construction of this instrument appears to me to be that the tenant should have a reasonable notice of his landlady's intention to demand the rent at the half quarter, before a distress could be put in. From the evi-

(*a*) Title "Rent."

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dence it appeared that the landlady had already made her election to receive the rent quarterly. Without deciding that she had thereby bound herself to receive the future payments of rent quarterly, it is enough to say that we hold it to be unreasonable and unlawful to distrain for the half quarter without a proper warning to the tenant. I therefore think this action was rightly brought, and that the rule for entering a nonsuit must be discharged.

Mr. Justice GASELEE.—It is not necessary for us now to decide that the plaintiff's landlady may not in future require the rent to be paid at the half quarter. It is enough for the present occasion to say that she cannot do so without a previous requisition, a reasonable notice.

Mr. Justice BOSANQUET.—In this agreement the reservation is of a quarterly rent, with a proviso that the landlady may convert it into a half quarterly rent: there must therefore of necessity be a previous demand or requisition on the part of the landlady to enable her to claim the benefit of the proviso. There having been no such requisition here, the distress was illegal.

Mr. Justice ALDERSON.—It may be very doubtful whether the landlady could, after having so long received the rent quarterly, alter the nature of the tenancy: but it is not necessary to consider that question. In the case of *Cranley* v. *Kingswell,* the tenant was bound to know the period at which his rent was payable. But in the case referred to in Bacon's Abridgment, of a penalty for nonpayment of the rent, the lessor must demand the rent before he can be entitled to the penalty. So, here, unless the tenant had notice of his landlady's intention to avail herself of the right reserved to her to demand the rent half quarterly, he was not liable to be distrained upon.

Rule discharged.

1833.

Tuesday, Nov. 19th.

A prisoner charged in execution for a debt exceeding 20*l.*, though the excess be made up of interest upon a sum originally less than 20*l.*, is not entitled to his discharge after being in custody twelve months, under the statute 48 Geo. 3, c. 123.

COOPER *v.* BLISS.

MR. Serjeant *Adams* moved that the defendant, a prisoner in the Fleet, might be discharged out of custody, under the statute 48 Geo. 3, c. 123, he having been detained in execution more than twelve months for a debt under 20*l.*

It appeared, that, in 1825, the defendant was indebted to the plaintiff in a sum of 15*l.* 10*s.*; that, in October, 1827, he gave a promissory note for the principal and interest, amounting to 17*l.* 1*s.* 6*d.*, payable on demand; that, in March, 1829, the plaintiff sued the defendant for the amount of the note and interest; and that, in May, 1832, on a rule to compute, the Prothonotary found the note, interest, and costs to amount together to 42*l.*; for which sum the defendant stood charged in execution.

The learned Serjeant submitted that the Prothonotary had improperly assessed the interest so as to make the debt and interest exceed 20*l.* [Lord Chief Justice *Tindal.*—The words of the act are "all persons in execution for any debt or damages not exceeding 20*l.* &c." Here, the defendant stands charged in execution for 42*l.*] The act means debt or damages due at the time the action is brought; not a debt that has since accumulated by interest or costs (*a*).

Lord Chief Justice TINDAL.—The words of the act are, that "all persons in execution upon any judgment, in whatsoever Court the same may have been obtained, and whether such Court be or be not a Court of record, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain

(*a*) At the time the action was brought, the principal debt, with interest at 5*l.* per cent., would amount to 18*l.* 6*s.* 6*d.*, and, at the time of the computation upon the rule, to 21*l.* 0*s.* 6*d.*

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in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as thereinafter mentioned, shall and may upon his, her, or their application for that purpose in term time made to some one of his Majesty's superior Courts of record at Westminster, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution by the rule or order of such Court." Here, the defendant is in execution for a debt and damages amounting, according to the ordinary computation, to more than 20*l.* I therefore think we have no authority to grant the rule prayed.

The rest of the Court concurring—

Rule refused (*a*).

(*a*) See *Robinson* v. *Sundell*, 6 J. B. Moore, 287. The defendant was arrested for a sum under 20*l.*, and defended the action until the debt and costs amounted to nearly 100*l.*, and afterwards gave a warrant of attorney for the whole, under which judgment was entered up and he was taken in execution. It was held that he was not entitled to his discharge under the 48 Geo. 3, c. 123, although he had lain in prison more than twelve months.

The act does not extend to the case of one in custody under an *attachment* for nonpayment of costs (*Rex* v. *Clifford*, 8 Dow. & Ryl. 58), or of money found due by an award (*Rex* v. *Hubbard*, 10 East, 408), or of money awarded on a reference to the Master (*Rex* v. *Dunne*, 2 Man. & Selw. 201), or to the King's coroner and attorney (*Rex* v. *Wakefield*, 13 East, 190) for compensation to the prosecutor on an indictment for an assault of which the defendant is convicted.

1833.

Thursday, Nov. 21st.

SMITH *v.* KING.

The plaintiff, in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations:—*Held*, that the defendant might have that part of the demand struck out of the declaration, on payment of the sum claimed, and costs.

THIS was an action by landlord against tenant for non-payment of rent, for dilapidations, and for permitting an auction to be held upon the demised premises, contrary to the defendant's covenant. The plaintiff in his particulars of demand claimed a specific sum of 50*l.* in respect of the dilapidations. The defendant obtained an order from Mr. Justice Park, directing, that, on payment by the defendant of the 50*l.*, and costs, all matters relating to the dilapidations should be struck out of the declaration, issue, and record.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule calling on the defendant to shew cause why the above-mentioned order should not be discharged, or why it should not be amended by striking out so much of it as directed all matters relating to the dilapidations to be struck out of the declaration, &c. He submitted that an application to pay money into Court on a claim for unliquidated damages had never been entertained (*a*).

Mr. Serjeant *Spankie* shewed cause.—He contended that the plaintiff having reduced his claim to a specific demand, the defendant ought to be allowed to satisfy that demand in order to put an end to the litigation.

Mr. Serjeant *Wilde* stated that an application had been made by the plaintiff (unsuccessfully) to Mr. Justice Park, for leave to amend his particulars, by inserting 150*l.* in lieu of 50*l.*—the latter sum having been put in by mistake.

Per CURIAM.—Under all the circumstances, let the 50*l.* be paid over to the plaintiff, and, if he proceed further in the suit, it will be at the hazard of costs.

Rule accordingly.

(*a*) See *Hodges* v. *Lord Litchfield*, ante, p. 201.

1833.

Friday, Nov. 22nd.

Judgment cannot be entered up against husband and wife on a warrant of attorney given by the wife dum sola, without leave of the Court.

STAPLES *v.* PURSER and Wife.

MR. Serjeant *Wilde* moved for leave to enter up judgment against husband and wife upon an old warrant of attorney (*a*) given by the wife dum sola.

Upon the authority of the case of *Hartford* v. *Mattingly* (*b*), the Court granted the rule.

(*a*) Judgment cannot be entered up on a warrant of attorney given *to* the wife dum sola, after her marriage, without leave of the Court, though the warrant of attorney be less than a year old. *Metcalfe* v. *Boote*, 6 Dowl. & Ry. 46.

(*b*) 2 Chit. Rep. 117. And see *Anonymous*, Lofft, 329.

Saturday, Nov. 23rd.

In an affidavit to hold to bail for principal and interest due on a bill of exchange, it must be made to appear that the amount due for principal is large enough to warrant an arrest.

LATREILLE *v.* HOEPFNER.

MR. Serjeant *Andrews*, on a former day, obtained a rule nisi that the defendant might be discharged on entering a common appearance, on the ground that the affidavit to hold to bail was defective: it stated that "A. Hoepfner was justly and truly indebted unto the deponent and to H. Wood and N. Dawson in the sum of 70*l.* 11*s.* 6*d.*, the balance of principal and interest due on a bill of exchange for the sum of 100*l.*, drawn by one John Bucklee upon and accepted by the said A. Hoepfner, payable fourteen months after the date thereof, and by the said John Bucklee indorsed to the deponent and the said H. Wood and N. Dawson: which said bill of exchange had been dishonored, and, to the extent of the said sum of 70*l.* 11*s.* 6*d.*, now remained due and unpaid."—The learned Serjeant submitted that, for any thing that appeared, the sum due for principal might not amount to a sum for which the defendant could lawfully be held to bail; and that the affidavit should have shewn how much was due for principal, and how much for interest.

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LATREILLE v. HOEPFNER.

Mr. Serjeant *Wilde* now shewed cause.—He contended, that the affidavit was in the usual form (*a*); that it was never the practice to separate the interest from the principal; and that, if any part of the money had been paid on account, the plaintiff was at liberty to apply it in the first instance in discharge of the interest, and therefore there could be no ambiguity.

Lord Chief Justice TINDAL.—This is certainly an extreme case; but still I think the objection must prevail.

Mr. Justice ALDERSON.—If the affidavit will admit of *any* construction to shew that the arrest might be unlawful, the party will be entitled to his discharge.

The rest of the Court concurring—

Rule absolute (*b*).

(*a*) See Tidd's Forms, 86.

(*b*) See *Brooke* v. *Coleman*, 1 Cromp. & Meeson, 621, where it was held by the Court of Exchequer, that, in an affidavit to hold to bail on a promissory note or bill of exchange, the amount for which the instrument is drawn must be specified.

REYNOLDS *v.* FLOWER and MARSDEN.

Saturday, Nov. 23rd.

THE plaintiff had been in the habit of consigning goods to Messrs. Flower & Marsden, the defendants, merchants, residing at Sidney, in New South Wales. Flower & Marsden corresponded with the house of Flower &

The plaintiff arrested the defendant for 400*l.*, having previously obtained acceptances for 320*l.*, for part of the debt, from the defendant's agents, to meet which remittances were made to the latter by the defendant:—*Held*, that the arrest for 400*l.* was made without reasonable or probable cause, and therefore that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3.

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Moss, in London: the Flowers were father and son. The plaintiff having consigned a quantity of goods to Flower & Marsden, and the remittances not coming so speedily as his necessities required, he applied to Messrs. Flower & Moss, and obtained from them on account of Flower & Marsden, their acceptances for 320*l.*, which were duly honored, and to meet which the defendants had made remittances to Flower & Moss. The plaintiff eventually became insolvent, and assigned his effects to trustees (Flower the father being one of them) for the benefit of his creditors. The trustees sued the defendants for the 400*l.*, arresting Flower, and outlawing Marsden. The cause was referred. The arbitrator, after considerable hesitation upon the facts presented to him, allowed the defendants credit for the 320*l.* obtained by the plaintiff from Flower & Moss; and also deducted a sum of 15*l.*, as to which the plaintiff failed to establish his case, and a further sum for a debt due from one of the defendants before the partnership, which was included in the plaintiff's demand: and the arbitrator awarded 35*l.* to the plaintiff, for which sum the verdict was entered.

Under these circumstances, Mr. Serjeant *Wilde*, on a former day, obtained a rule calling upon the plaintiff to shew cause why he should not pay the defendant Flower his costs, under the 43 Geo. 3, c. 46, s. 3, on the ground that he had been arrested and held to bail without reasonable or probable cause to the extent of 400*l.*

Mr. Serjeant *Stephen* now shewed cause.—By the terms of the reference the costs were to abide the event of the award: this application, therefore, is in direct violation of the agreement between the parties. [Lord Chief Justice *Tindal*.—This is a collateral legal event. The only question is as to whether or not the plaintiff had reasonable or probable cause for causing the defendant to be arrested

and held to special bail.] In *Keene* v. *Deeble* (*a*), the defendant having been held to bail for 38*l.*, paid 2*l.* into Court, which the plaintiff did not take out; but, before the cause was called on for trial, it was agreed to refer the cause and all matters in difference to an arbitrator, with power to him to examine the parties on oath, and call for books, &c.; the costs of the cause to abide the event; and the arbitrator having awarded only 1*l.* 19*s.* in addition to the 2*l.* paid into Court—it was held that the defendant was not entitled to his costs under the statute. Mr. Justice Bayley said (*b*): "I think that the money awarded in this case cannot be considered as money recovered in the action. It was awarded upon a reference of the action and all matters in difference. The parties might have made a special provision for the costs, but by the rule they agreed that they should abide the event of the award." And Mr. Justice Littledale said: "At the trial the defendant's evidence could not have been received; before the arbitrator it was admissible, and might possibly operate to reduce the plaintiff's damages. When, therefore, parties by their agreement take a case out of the ordinary course of investigation, I think that they take it out of the statute." [Lord Chief Justice *Tindal*.—In that case there was no verdict; here there was: that makes a material difference.] In *Thompson* v. *Atkinson* (*c*), the defendant was arrested for 179*l.* At the trial a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred; and the costs of the cause were to abide the event of the award. The arbitrator found that at the commencement of the suit there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.*, and that the plaintiff had no reasonable or probable cause for arresting

(*a*) 5 Dow. & Ryl. 383; S. C. 3 Barn. & Cress. 491.

(*b*) 3 Barn. & Cress. 493.

(*c*) 6 Barn. & Cress. 193.

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the defendant for 179*l.*, and that the defendant, by reason thereof, was to have compensation or damages to the amount of 20*l.* The arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 10*s.*, the balance due to him after deducting the damages awarded to the defendant. The Court refused to allow the defendant costs under the statute, inasmuch as by the terms of the reference the costs were to abide the event of the award, and that was in favour of the plaintiff. And in *Silversides* v. *Bowley* (*a*), the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to a reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 15*l.* Upon an application to the Court to allow the defendant his costs under the statute, it was held, that, in order to entitle the defendant to such costs, he must shew that the arrest was vexatious and malicious. [Mr. Justice *Bosanquet*.—The more recent cases have determined that malice is not necessary (*b*).] It appears here from the hesitation of the arbitrator, that it was a matter of doubt whether the deduction of the 320*l.* should be allowed. It cannot therefore be said that the arrest was altogether vexatious. [Lord Chief Justice *Tindal*.—The case of a set-off comes within the act—*Ashton* v. *Naull* (*c*).] The question is, whether the plaintiff has acted so unreasonably and with such culpable negligence as to render himself liable to the penalties imposed by the act.

(*a*) 1 J. B. Moore, 92. And see *Turner* v. *Prince*, 2 Moore & Payne, 305. *Sherwood* v. *Taylor*, 3 Moore & Payne, 641. *Spooner* v. *Danks*, 5 Moore & Payne, 701.

(*b*) See *Donlan* v. *Brett*, 10 Barn. & Cress. 117. *Forster* v. *Weston*, 4 Moore & Payne, 276.

(*c*) Ante, p. 187. Where there have been mutual dealings between the plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3.

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Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears from the affidavits that, a month before the time of the arrest, the defendants had to the knowledge of the plaintiff remitted 320*l.* to their agents here, who accepted bills for the plaintiff upon this precise fund. The plaintiff therefore could have no reasonable or probable cause for holding the defendants to bail for that sum. The attention of the plaintiff being specifically called to this sum of 320*l.*, he ought to have been prepared to shew us that he derived no benefit from the remittance. As well in a moral as in a legal point of view, I think the defendant Flower has been, in the words of the act, held to special bail for the sum of 400*l.* without reasonable or probable cause, and therefore that he is entitled to his costs.

Mr. Justice GASELEE and Mr. Justice BOSANQUET concurred.

Mr. Justice ALDERSON.—The remittance to Flower & Moss must for this purpose be considered as a remittance to the plaintiff himself.

Rule absolute.

WETTENHALL *v.* WAKEFIELD.

Monday, Nov. 25th.

A RULE was obtained by Mr. Serjeant *Jones*, in Trinity Term last, calling upon the plaintiff to shew cause why the defendant should not be at liberty to enter a sug-

A barrister is not exempted from liability to be sued in the London Court of Requests, under the 39 & 40 Geo. 3, c. civ. Therefore, where the defendant, a barrister having chambers in the Temple, was sued in this Court for a claim of 6*l.* 6*s.*, reduced by the verdict to 4*l.* 4*s.*, the Court permitted him to enter a suggestion on the roll to deprive the plaintiff of costs.

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gestion on the record under the London Court of Requests Act, 39 & 40 Geo. 3, c. CIV, in order to deprive the plaintiff of his costs. The motion was founded upon the affidavit of the defendant, who described himself as of No. 9, King's Bench Walk, Inner Temple, in the city of London, barrister at law, and stated that at the time of the commencement of this suit he lived and was wholly resident within the city of London, viz. at No. 9, King's Bench Walk aforesaid; that he had been for and during all that time, and still was, liable to be summoned to the Court of Requests held at the Guildhall of the said city; and that the plaintiff on the trial of the cause recovered a verdict for the sum of 4*l.* 4*s.*, and no more.

Mr. Serjeant *Taddy*, on a subsequent day, shewed cause (*a*).—Attornies plaintiffs are not, within the London Court of Conscience Act, 39 & 40 Geo. 3, c. CIV, compellable to sue there for a debt under 5*l.*, at the peril of costs—*Board* v. *Parker* (*b*): neither is an attorney plaintiff compellable under that act to sue in the inferior Court where the defendant is also an attorney—*Hodding* v. *Warrand* (*c*). Attornies plaintiffs are in no case compellable to resort to the local jurisdiction unless their privilege is taken away by the express words or by the necessary construction of the statute establishing such Court: therefore, in *Johnson* v. *Bray* (*d*), where an attorney of this Court sued here by attachment of privilege, and recovered

(*a*) Upon the affidavit of the plaintiff and of his attorney's clerk, in which it was alleged that the action was brought to recover 6*l.* 6*s.* for services performed by the plaintiff for the defendant; that the defendant occupied chambers at No. 7, South Square, Gray's Inn; that a writ of summons sued out at the instance of the plaintiff was duly served on him there; and that his attornies undertook to appear thereto for him.

(*b*) 7 East, 46; S. C. 3 Smith, 52.

(*c*) 7 East, 50, n.

(*d*) 5 J. B. Moore, 622; S. C. 2 Brod. & Bing. 698. S. P. *Gould* v. *Colyer*, 1 Smith, 334.

less than 5*l.*, the Court negatived a motion to restrain him from taking out execution for costs, although the debt for which he sued was recoverable under the 47 Geo. 3, c. xxxvii, which enacts that if any action should be brought in any other Court for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the Court of Requests established thereby, the plaintiff, by reason of a verdict for him, should not have any costs. As therefore attornies are not within the act, barristers cannot be, inasmuch as they fill a higher rank in the profession; and the act must be taken to have intended to exclude all members of the profession. [Lord Chief Justice *Tindal* suggested a doubt as to whether King's Bench Walk was for the purposes of the act in question within the city of London.]

Mr. Serjeant *Jones*, in support of his rule.—The court in question embraces the whole city of London and the liberties thereof, and the act, being remedial, must receive the most liberal construction of which its words are susceptible. The defendant's affidavit is sufficiently affirmative of the fact of his residence within, and of his liability to be summoned to the Court of Requests for the city of London. In *Fleming* v. *Davies* (*a*), where the plaintiff sued the defendants in a superior Court for a demand above 5*l.*, and, upon judgment by default, the jury assessed the damages at 5*l.*, and it appeared that the defendants at the time of action brought resided within the jurisdiction of the London Court of Requests, and might have been sued there under the statute in question, the Court stayed the proceedings, upon payment of the damages, without costs. Even supposing the defendant to have, as suggested in the affidavits on the other side, a residence in Gray's Inn, that does not render him the less liable to be summoned to the Court of Requests for London—*Croft* v. *Pitman* (*b*),

(*a*) 5 Dow. & Ryl. 371. (*b*) 1 Marsh. 269; S. C. 5 Taunt. 648.

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Kemsett v. *West* (*a*). The object of the act was to establish a cheap tribunal for the recovery of small debts; and the 10th section enacts "that no privilege shall be allowed to exempt any person from the jurisdiction of the Court of Requests on account of his being an attorney or solicitor or any other officer of any of the Courts of law or equity at Westminster; but that all attornies, solicitors, and officers shall be subject to the several processes, &c. of the Court of Requests, in the same manner as any other persons are subject to the same by virtue of the act." The words of the 5th section, which renders all persons whomsoever residing or inhabiting within the city liable to be summoned to the Court of Requests, are general; and no other clause in the act excludes barristers from the liability imposed by that section.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an application on the part of the defendant for leave to enter a suggestion on the roll, under the 39 & 40 Geo. 3, c. civ., (the London Court of Conscience Act), on an affidavit that the plaintiff had recovered a verdict for 4*l.* 4*s.* only, and that at the time of the commencement of this suit the defendant lived, and was wholly resident, within the city of London, and that he was during all that time, and still is, liable to be summoned to the Court of Requests held at the Guildhall of the said city. As there are several causes of action excepted out of the operation of the act, the affidavit of the defendant would, of itself, have been insufficient to support the motion, inasmuch as it omitted to state "that the present cause of action was recoverable in the Court of Requests," an allegation that is usually found

(*a*) 5 Dowl. & Ryl. 626. And see *Bushnell* v. *Levi*, 2 Moore & Payne, 577.

in affidavits in support of such applications. But this defect in the defendant's affidavit appears to us to be removed by the affidavit of the plaintiff, which was used in answer to it, which latter states that the action was brought for services rendered by the plaintiff for the defendant.

The principal ground, and, indeed, the only one of any weight relied upon by the plaintiff in opposing this application, was one which arose from the defendant describing himself in his affidavit as a barrister at law. And it was thereupon contended that a barrister, when defendant, is exempted from the operation of the act; and, if exempted, that he cannot by his own election not to avail himself of such exemption, bring the plaintiff within the operation of the act; and consequently that the defendant is unable to enter the suggestion. Upon looking, however, at the act, we are satisfied there is no ground for contending that a barrister is entitled to any such exemption. The preamble to the act recites that doubts had existed "whether *attornies* and *solicitors*, and other officers of any of the Courts of law or equity," were subject to the process of the said court; and then goes on to enact, that no privilege shall be allowed to exempt any person from the jurisdiction of the said court, "on account of his being an attorney or solicitor or any other officer of any of the Courts of law or equity at Westminster, or any other Court whatsoever," but that all attornies, &c., shall be subject to the several processes, orders, &c., in the same manner as any other persons. Now, as this clause commences by the enumeration of attornies and solicitors, by a well-known rule of construction, the general words which follow cannot be considered as excluding any persons in the profession of the law of a higher rank or degree than an attorney or solicitor, even if it could be maintained that a barrister is strictly and properly "an officer of the Court." It follows, therefore, that, on the proper construction of the act, we must take it to

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mean that the doubts therein stated to have existed, are not doubts as to the exemption of barristers, and consequently that the enactment does not extend to barristers, but that they fall within the very general description of persons who are made subject to the provisions of the act. The defendant, therefore, as it appears to us, is entitled to put his suggestion on the record; when the plaintiff may answer it by any allegation of fact or law, as he may be advised.

Rule absolute.

Monday, Nov. 25th.

Where the sheriff has neglected to comply with rule IV. of Michaelmas Term, 3 Will. 4, by indorsing on the writ of capias the day of its execution, the party's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return.

MOORE *v.* THOMAS.

MR. Serjeant *Wilde* moved for a rule nisi for an attachment against the sheriff of Cornwall for not indorsing on the process the day of the execution thereof, in pursuance of the rule of Michaelmas Term, 3 Will. 4, by which it is ordered "that the sheriff or other officer or person to whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and, in default thereof, shall be liable in a summary way to make such compensation for any damage that may result from his neglect as the Court or Judge shall direct." [*The Court* referred to *Ridley* v. *Weston* (*a*), where it was held, that, where the sheriff has neglected to comply with the rule in question, the plaintiff's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return.] The learned Serjeant submitted that, the case of *Ridley* v. *Weston* having arisen shortly after the passing of the statute 2 Will. 4,

(*a*) Reg. IV., ante, Vol. 2, p. 724.

c. 39, and the making of the rule, the Court might not on that occasion have felt inclined to visit the sheriff with harshness; but that no such reason for a lax construction of the rule existed now. [Mr. Justice *Bosanquet*.—The penalty being given by the rule, seems to exclude a motion like the present.] The penalty mentioned in the rule is cumulative; the sheriff is always liable to an attachment for a breach of duty: were it otherwise, there would be nothing to induce the sheriff to adhere to the rule. If a plaintiff's only remedy in such a case as this is by motion to compel the sheriff to amend his return, great delay in all cases, and possible injury and loss to the plaintiff in many, will be the necessary result.

Lord Chief Justice TINDAL.—The rule of Michaelmas Term, 3 Will. 4, renders the sheriff liable, in a summary way, to make such compensation for any damage that may result from his neglect as the Court or a Judge shall order. The Court or the Judge before whom the proceeding is had will look at the circumstances of the case, and take into consideration the injury the plaintiff may have sustained, and assess the amount of compensation to be paid by the sheriff accordingly.

Rule nisi in the terms of the rule in *Ridley* v. *Weston* (*b*)—cause to be shewn at Chambers.

(*b*) Calling on the sheriff to shew cause why he should not amend his return to the writ by indorsing thereon the true day of the execution thereof, and why he should not make such compensation to the plaintiff as the Court should direct, and why he should not pay the costs of the application.

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Monday, Nov. 25th.

Where the copy of the process delivered to a defendant on his arrest varies in any degree from the capias, the Court will discharge the party out of custody on filing common bail.

NICOLL *v.* BOYNE.

MR. Serjeant *Wilde*, on a former day, obtained a rule nisi for the defendant's discharge out of custody at the suit of the plaintiff in this cause, on filing common bail, on the ground of certain variances between the writ of capias and the copy thereof served upon the defendant; the latter containing no description of the defendant, omitting the name of the filacer, and being directed to the *sheriff* of London.

Mr. Serjeant *Stephen* now shewed cause.—The application is informal; it should have been to set aside the capias, which would be in itself a discharge. The defendant by consenting to file common bail waives the objection to the process. [Lord Chief Justice *Tindal*.—He does not enter common bail until he is discharged: they are simultaneous acts.] The application in its present form is unsupported by authority (*a*). "Sheriffs" is nomen collectivum: the two sheriffs of London form in fact but one officer. [Lord Chief Justice *Tindal*.—The City of London has two sheriffs by a grant of King John. A writ addressed to the sheriff of London is addressed to a non-existing officer.] The slight defects complained of are only in the copy of the writ. The uniformity of process act (*b*), in requiring a *copy* to be served, manifestly did not intend that it should be a fac simile of the process, but a substantial copy. In *Clutterbuck* v. *Wildman* (*c*), where the question arose upon a quo minus, it was held that the variance, to avail the party, must have a tendency to mislead. The principle of that case, though determined upon the construction of the 12 Geo. 1, is applicable to the late act. In ——— v. *Lawrence* (*d*), where the objection was

(*a*) But see *Richard* v. *Stuart*, ante, p. 774.

(*b*, 2 Will. 4, c. 39, s. 4.

(*c*) 2 Tyrw. 276.

(*d*) MS. Exchequer.

the defendant was misdescribed in the writ, Lord Lyndhurst asked—"What prejudice has the defendant sustained?" *Byfield* v. *Street* (*a*) will probably be relied on in support of the motion. Though apparently an authority, it will be found upon examination to be so to no material extent.

Lord Chief Justice TINDAL.—It will be much the more safe course to adhere to the strict letter of the statute, to a general rule applicable to all cases and intelligible to all persons, than to permit arguments as to the effect of the particular variance in each case. The words of the act require a copy of the writ be delivered to the party arrested: that must be a *true* copy. When we find that the copy varies from the process, why should we stop to inquire whether the variance be material or not? Here, the writ is directed to the "sheriff of London;" and we know that the office of sheriff for the city of London is vested in two persons: the copy contains a direction to the "sheriff"—a non-existing officer. I therefore think the rule must be made absolute.

Mr. Justice GASELEE.—I agree with my Lord Chief Justice that it will be the more convenient course to adhere to the forms and directions prescribed by the statute.

Mr. Justice BOSANQUET.—I am of the same opinion. It is true that the principal variance here complained of is occasioned by the omission of a single letter only; but still I think it fatal.

Mr. Justice ALDERSON.—If the only ground of objection

(*a*) Ante, p. 406; S. C. 10 Bing. 27. There the Court refused to allow an amendment of a copy of a writ of capias delivered to a party on his arrest, which copy differed in the date from the writ itself; but set aside the service, and directed the party to be discharged on entering a common appearance.

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NICOLL v. BOYNE.

were the misspelling of a word, as, if the word "sheriffs" had been spelt with one f only, there would be something in the argument.

Rule absolute.

Monday, Nov. 25th.

The plaintiff obtained judgment against the defendant, and sued out a fi. fa. thereon. The sheriff entered the defendant's house under the writ, but found that his goods were already under distress for rent and taxes, and that he had also made an assignment and executed a bill of sale of all his goods. The officer was thereupon withdrawn, and the plaintiff, without waiting the return of the fi. fa., sued out a ca. sa., under which the defendant was taken. The Court refused to discharge him out of custody.

DICAS *v.* WARNE.

THE plaintiff having obtained judgment against the defendant in this cause sued out thereon a writ of fi. fa., under which the sheriff entered the defendant's house, and remained therein about ten days; when, it appearing that the goods were already under a distress for rent and taxes, and that the defendant had before the issuing of the fi. fa. executed a bill of sale and an assignment of all his property, the officer was withdrawn, and the plaintiff, without awaiting the return of the fi. fa., sued out a ca. sa., under which he caused the defendant to be taken and detained.

Mr. Serjeant *Jones*, on the part of the defendant, obtained a rule calling upon the plaintiff to shew cause why he should not be discharged out of custody, on the ground that the ca. sa. had been improperly issued pending the fieri facias.

Mr. Serjeant *Wilde* shewed cause.—A plaintiff is only precluded from suing out a ca. sa. before the return of a previous fi. fa., where the fi. fa. has been in fact executed, and something has been obtained under it. Here, however, the execution was wholly fruitless.

Mr. Serjeant *Jones*, in support of his rule.—The ca. sa. was improperly sued out. It does not indeed appear that the plaintiff obtained any fruits under the fi. fa.: but the

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rule is this, where the writ of fi. fa. has once been executed and possession taken under it, the plaintiff must wait until the return of it before he can sue out a ca. sa.§[Lord Chief Justice *Tindal.*—Possession means possession of the defendant's goods. Here, ex concessis, the sheriff was never in possession of the goods.] The execution of process means the entering into possession, not an available execution. In *Lawes* v. *Codrington* (*a*), Mr. Justice J. Parke says: "If you execute the fi. fa., you cannot take another step till the following term; for, that writ cannot be returned into Court, until the Court, in contemplation of law, is sitting." And in *Miller* v. *Parnell* (*b*) it was held, that, where the sheriff has taken goods in execution under a fi. fa., the plaintiff cannot sue out a ca. sa. till the fi. fa. has been returned; though he should have withdrawn his execution under the first writ. [Mr. Justice *Bosanquet* referred to *Edmond* v. *Ross* (*c*), where this precise point was determined.]

Lord Chief Justice TINDAL.—I am unable to distinguish this case from *Edmond* v. *Ross.* It was there held that a ca. sa. may be sued out and the defendant arrested thereon before the return of a writ of fi. fa. previously executed by entering on the possession of the defendant's goods, as soon as the writ of fi. fa. is withdrawn, if during the whole time of such possession by the sheriff a person is also in possession of the same goods under a distress for rent. The case of *Miller* v. *Parnell* was cited in *Edmond* v. *Ross,* and we must therefore take it over-ruled. Here, when the sheriff enters he finds the goods of the defendant already in the custody of the law under a distress for rent and for taxes; and it also turns out that the defendant has executed an assignment and bill of sale by which

(*a*) 1 Dowl. P. C. 30. (*b*) 2 Marsh. 78; S. C. 6 Taunt. 370.
(*c*) 9 Price, 5.

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all his property is aliened, Can it, under these circumstances, be said that the defendant's goods were taken under the fi. fa.? In the case of *Lawes* v. *Codrington*, there was a partial benefit (though small) derived by the plaintiff from the execution of the ca. sa.: a sum of 17*s.* 6*d.* had been levied.

Mr. Justice GASELEE.—I am of opinion that the only feature in the present case that at all distinguishes it from that of *Edmond* v. *Ross*, is, the gross fraud that has been attempted by this defendant.

Mr. Justice BOSANQUET.—The point is expressly decided in *Edmond* v. *Ross*. It was there distinctly taken and strongly argued; and *Miller* v. *Parnell* was brought under the notice of the Court of Exchequer. In that case some goods had been taken under the fi. fa.: in *Edmond* v. *Ross*, none; the distress was in the house when the sheriff entered. The Court did not rest their decision solely upon the lateness of the application: they conclude with saying that they are of opinion that not one of the objections taken was supported by the facts of the case or by the rules which govern the practice of the Courts.

Mr. Justice ALDERSON.—The only reason why the Court requires the fi. fa. to be returned before the issuing of a ca. sa. is, that it may be ascertained to what extent the former writ has been available. If the fi. fa. has not been executed at all, there can be no necessity for waiting its return before the ca. sa. issues.

Rule discharged.

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COOMBS *v.* DOD.

In the case of a London commission, the Court will not enlarge the time for the render of the principal until after his final examination before the commissioners.

A RULE had been obtained, on behalf of the bail in this cause (*a*), calling upon the plaintiff to shew cause why the proceedings on the capias ad satisfaciendum issued against them should not be stayed until after the 27th of December next, the defendant having become bankrupt, and that being the day appointed by the commissioners for his final examination under the fiat, in London.

Mr. Serjeant *Wilde* now shewed cause.—This being a London commission, no such inconvenience can arise as that suggested in the case of *Glendinning* v. *Robinson* (*b*), where it was held, that, if a defendant become bankrupt, and be required to appear to a commission in a distant county, the Court will enlarge the time for the bail to surrender him till a reasonable time after the end of his last examination before the commissioners; and therefore the rule there laid down cannot apply.

Lord Chief Justice TINDAL.—The bail are not precluded from rendering their principal. The Court of Review may cause him to be brought up for examination when required. I therefore think this is not a case in which we ought to interfere.

Mr. Justice BOSANQUET.—The point is expressly determined in *Shaw* v. *Cash* (*c*). There, a bankrupt being about to be taken in execution, the Court refused, upon an application supported by an affidavit which omitted to state where the commission was sued out, or where the

(*a*) The affidavit in such a case must state the application to be made on behalf of the bail. *Harris* v. *Glossop*, 2 Chit. 101.

(*b*) 1 Taunt. 320.

(*c*) 12 J. B. Moore, 257; S. C. 4 Bing. 80.

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commissioners resided, to enlarge the time for the bails' surrendering him until a month after his final examination. Lord Chief Justice Best said, that, "if the parties resided in London, there would be no necessity for the application, as the defendant might be brought up from the Fleet for examination."

Rule discharged.

Monday, Nov. 25th.

Semble that the rule laid down by the Courts at Westminster as to new trials where the sum recovered is under 20*l.*, applies to causes tried in the sheriff's court.

HENNING *v.* SAMUEL.

THIS was an action of assumpsit to recover the sum of 18*l.* for goods sold and delivered. At the trial before the Sheriff of Middlesex, a witness of the name of Gough was called on the part of the plaintiff to prove the delivery of the goods. The defence attempted to be set up was—first, that the goods were not according to order; which entirely failed—secondly, that Gough was in partnership with the plaintiff. The witness who was to have proved this latter fact, mistaking the place of trial, was not present; and consequently a verdict was found for the plaintiff.

Mr. Serjeant *Stephen* now moved for a rule nisi for a new trial on payment of costs.—He cited *Shillito* v. *Theed* (*a*), where the Court granted a new trial, on payment of costs, where the plaintiff had been nonsuited, in an action against the acceptor of a bill of exchange, by reason of the accidental absence of the witnesses subpœnaed by him to prove the handwriting of the defendant. [Lord Chief Justice *Tindal*.—That case does not apply: there the debt sought to be recovered must have been above 20*l.*; here it is under.] The debt must neces-

(*a*) 4 Moore & Payne, 575.

sarily be under 20*l.*, otherwise the cause is not triable in the sheriff's court: and if that be an objection, there never can be a new trial.

PER CURIAM.—The Court think they ought not to interfere in this case. The defendant might, when he found his witness absent, have applied for the postponement of the trial.

Rule refused.

CURTIS *v.* CURTIS.

Monday, Nov. 25th.

THIS was an action on the case for slander. The declaration charged that the defendant imputed to the plaintiff that he was the writer of a certain scandalous letter reflecting upon the character of the defendant. The latter pleaded the general issue, and also a plea of justification setting forth the letter, and asserting that the plaintiff was the author.

In an action of slander imputing to the plaintiff that he was the writer of a scandalous letter reflecting upon the defendant, the latter in one of his pleas set forth the letter and justified the words spoken. The Court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to shew that it was not in his handwriting.

Mr. Serjeant *Wilde*, on a former day, obtained a rule nisi that the plaintiff might be at liberty with certain witnesses to inspect the letter in question in the hands of the defendant, in order that he might be prepared with evidence to negative the fact of its being in his handwriting.

Mr. Serjeant *Stephen* now shewed cause.—The Court have no jurisdiction in this case: they cannot compel the defendant to furnish evidence against himself. The only case in which a party is compelled to produce for the inspection of his opponent a document in his custody, is, where he can be considered as holding it as trustee. In *Jessel* v. *Millingen* (*a*), the Court refused to allow the

(*a*) 1 Moore & Scott, 605.

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plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the action, upon an affidavit of the plaintiff, that, if such document existed, and purported to be signed by him, the signature was a forgery. Lord Chief Justice Tindal there says: "Inspection of documents in the custody of an adversary, is only permitted where they are to some extent the property of both parties, as in the case of an agreement of which there is but one copy; there, the party who holds it, holds it as trustee for the other. But, by the present motion, the plaintiff seeks to compel the defendant to shew the nature of his defence to the action." [Mr. Justice *Alderson*.—How can this case differ from the ordinary one of an application for leave to inspect a bill of exchange, which we are in the daily habit of allowing?] In that case the plaintiff declares on the bill, and the inspection is sought in analogy to a profert; which is very different from the present case. In *Hildyard* v. *Smith* (*a*), in an action on a bill of exchange, the Court refused to compel the plaintiff to deposit it in the hands of the Prothonotary, for the purpose of enabling the defendant to inspect it, in order to ascertain whether the signature had been forged.

Mr. Serjeant *Wilde*, in support of his rule.—The Court has abundant jurisdiction in the matter. All that is required is, that the plaintiff may have an opportunity of shewing the letter to his witnesses, that they may be prepared to prove that the handwriting is not his. In *Jessel* v. *Millingen* the agreement was not upon the record: and the main ground of the decision was that the party applying was not prepared to shew the existence of the docu-

(*a*) 8 J. B. Moore, 586; S. C. 1 Bing. 451. And see *Thelfall* v. *Webster*, 7 J. B. Moore, 559; S. C. 1 Bing. 161.

ment. And in *Hildyard* v. *Smith* the motion was made before declaration; and the Court said they could not interfere in that stage of the proceedings.

Lord Chief Justice TINDAL.—*Hildyard* v. *Smith* is quite foreign from the present case. Here, the defendant in his plea sets up a letter which he states to be in the handwriting of the plaintiff; and the latter seeks to inspect it so that he may be prepared with witnesses at the trial to disprove that statement. Good sense and justice require that the inspection prayed should be granted; otherwise the plaintiff may be surprised at the trial, and the cause may consequently have to go down again. In *Jessel* v. *Millingen* the sole ground of the motion was an idle assertion made by the defendant's attorney, that he had in his possession a document bearing the plaintiff's signature, that, when produced, would put an end to the cause. The existence of the writing itself was not made sufficiently to appear: whereas here the defendant sets out the letter in question upon the record. Besides, the plaintiff does not even want to know the contents of the paper here. The rule must therefore be made absolute for liberty to the plaintiff to inspect the letter in the hands of the defendant's attorney a reasonable time before the trial, upon giving twenty-four hours' notice.

Mr. Justice BOSANQUET.—I am of the same opinion. Where forgery is suggested, an inspection of the document is constantly allowed.

Mr. Justice ALDERSON mentioned a case wherein Mr. Justice Bayley, at the Assizes for Westmoreland, granted an inspection under circumstances precisely similar to the present.

Rule absolute.

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BELCHER and Others, Assignees of JOHN MABERLY, a Bankrupt, *v.* LLOYD and Others.

Friday, Nov. 22nd.

The defendants were the holders of a bill of exchange accepted by one M. for 760*l.* which was indorsed to them by the Commercial Bank of Scotland; and they were also the acceptors of a bill for 1000*l.* drawn by the Commercial Bank in favour of M. The former bill became due on the 6th January, and was dishonored, M. having stopped payment. On the 7th, the defendants debited the Commercial Bank in their account with them with the 760*l.*, and wrote a receipt on the back of the bill, and returned it protested to the Commercial Bank. The latter, hearing of M.'s failure, on the 6th, wrote to the defendants, requesting them to keep the 760*l.* bill, and set off the amount against the 1000*l.*, their acceptance, which would become due on the 12th.

THIS was an action of assumpsit brought by the plaintiffs, assignees of John Maberly, a bankrupt, to recover from the defendants a sum of 1000*l.*, the amount of a bill of exchange drawn at Edinburgh by the Commercial Banking Company of Scotland, on the 30th December, 1831, upon and accepted by the defendants by the description and addition of Messrs. Jones, Lloyd, & Co., bankers, London, payable ten days after date to the order of John Stephens, and indorsed by Stephens to Maberly before his bankruptcy.

The defendants pleaded—first, non assumpsit—secondly, a set-off, alleging that Maberly before and at the time of his bankruptcy and still *was indebted to the defendants* in the sum of 760*l.* upon and by virtue of a bill of exchange dated the 24th December, 1831, drawn at Aberdeen by Maberly under the style and firm of John Maberly & Co. upon John Maberly & Co. of London for 760*l.*, payable, ten days after date, to one Alexander Blackie or order, and indorsed by Blackie to one Alexander Macartney, as manager for the Commercial Bank of Scotland, and by him indorsed to the defendants.

To this last-mentioned plea the plaintiffs replied that Maberly before and at the time of his bankruptcy was not indebted to the defendants, modo et forma. The balance was paid into Court.

The cause was tried before Lord Chief Justice Tindal, at the Sittings at Guildhall after the last term. The facts appearing in evidence were as follow:—Maberly was a Scotch banker, having his principal bank at Edinburgh,

In an action by the assignees of M. (who afterwards became bankrupt) against the defendants, as acceptors of the 1000*l.* bill:—*Held*, that they were not entitled to set off the 760*l.*

and branch banks at other places. John Stephens was the agent in London for these banks. The defendants were the agents in London of the Commercial Bank of Scotland. Maberly and the Commercial Bank both issued notes in Scotland; and each had a branch bank at Aberdeen. Between the Commercial Bank and the other Scotch banks were kept exchange books and accounts; and periodical exchanges of their notes were made, and a draft on London given by the one to the other for the difference. An exchange of notes took place between the two branch banks at Aberdeen on the 24th December, 1831, and the balance, 760*l.*, in favour of the Commercial Bank, was satisfied by a draft for 760*l.* on Maberly & Co. in London, at ten days' date, due on the 6th January, and payable to Mr. Blackie, the manager of the Commercial Bank at Aberdeen. This bill was indorsed by Blackie to the manager at Edinburgh, and by him to the defendants; and was the bill sought to be set off. An exchange of notes also took place between the Commercial Bank and Maberly's bank at Edinburgh, on the 30th December; upon which occasion the latter received from the former the 1000*l.* draft which is the subject of this action. On the 2nd of January, 1832, Maberly & Co. stopped payment in London. On the 3rd, the defendants communicated the intelligence to the Commercial Bank. On the 6th, the bill for 760*l.*, accepted by Maberly & Co., was dishonored. On the same day, the secretary of the Commercial Bank addressed to the defendants the following letter:—

"The information contained in the postscript to your letter of the 3rd instant had previously reached us; Messrs. Maberly & Co.'s house here having refused payment of their notes from the morning of yesterday; and we find that one of our neighbour banks had notice of the fact from their London correspondents on the preceding day. There is a draft for 1000*l.* from this office on you, No. ##,

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granted on the 30th ult., at ten days, and payable to John Stephens, one of the persons in their bank here, which was given by us to Messrs. Maberly & Co. for the balance of an exchange of notes. This draft will be due on the 12th current, and we would wish if possible that payment of it should be declined, which we think may easily be done if it be in the hands of Messrs. Maberly & Co., or of any party who has not given value for it, or who is not a creditor of that house. I inclose a list of their acceptances which have been cashed at various of our agencies, and which are still current and in your hands. The first of them, we apprehend (for we have not had time to hear from any of our branches), has been granted for the balance of an exchange of notes at Aberdeen. The others are indorsed by parties who may perhaps be good; and, from the circumstance of the last of them having been by your advice of the 4th current, received to-day, accepted by Richards & Co., we are in hopes that the others in the list may be taken up by them, as being on account of Mr. Maberly's concerns different from his banking ones. The first, however, we expect you will have returned under protest to us before this reaches you; and there may have been other drafts taken by our agents within these few days which we do not know of, as well as notes that have come into their hands, and which have not been either exchanged or remitted to us by them. It is even possible that the earlier knowledge of the failure by another bank having numerous branches may have tended to throw some more of the notes into the hands of our agents. We ourselves have only about 20*l.* of them in our possession.

"In these circumstances, we think that you would be entitled to retain the 1000*l.* contained in our draft of the 30th ult. as a set-off for the draft for 760*l.*, and of any others which may yet be sent up to you, and of the bank-notes which we or any of our agents may have, and that

the one may be offered in exchange for the other. At all events, we will trust to your doing your best for us in this matter, and keeping hold of the 1000*l.* if possible."

On the 7th January (before the above letter reached London), the defendants returned the bill for 760*l.* to the Commercial Bank, protested, with the following receipt written thereon; and their account with the defendants was debited with the amount:—

"Received of Alexander Macartney, Esq., manager for the Commercial Banking Company of Scotland, the sum of 760*l.*, principal, and 19*s.* notarial charges on the within-mentioned bill.

For Jones, Lloyd, & Co.
Thomas Moss."

The letter of the 7th, containing the bill and protest, was received by the Commercial Bank in the afternoon of the 9th; when one Borthwick, a clerk in the establishment, not being aware of the letter of the 6th, addressed to Jones, Lloyd, & Co., in the performance of his ordinary duty, struck out the indorsement of the Commercial Bank, and was proceeding to make a memorandum on the back of the protest of the return of the bill to Mr. Blackie at the branch bank at Aberdeen; but, before he had finished that memorandum, one Cunningham, the superintendent of the Commercial Company's branch banks, stopped him; and, on the same evening, the bill and protest were returned to the defendants in a letter containing the following paragraph:—"We return you, with protest, draft upon Maberley, 760*l.*, to enable you to carry into effect our views, as stated in our letter of the 6th instant."

At the time the bill was returned to the Commercial Bank, the cash balance between them and the defendants was in favour of the latter; but the defendants subsequently received assets sufficient to cover the bill.

On the 10th, the defendants, in answer to the letter

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from the Commercial Bank of the 6th, wrote them as follows:—"With respect to your draft upon us in favor of J. Stephens, we will certainly bear in mind your remarks respecting it when it appears on the 12th instant; but, being accepted by us, it must, we apprehend, be paid; and we fear that any attempt to make use of the returned bill or unpaid notes in your hands as a set-off against our acceptance, would be perfectly fruitless."

On the 12th, the defendant's acceptance was presented for payment; when the bill for 760*l.* was tendered in part payment, and refused. The bill was consequently not paid. On the same evening the defendants wrote to the Commercial Bank as follows:—

"Our acceptance of the Commercial Bank's draft for 1000*l.*, due to-day, has been presented to us for payment. Believing, from the circumstances attending the presentation of the bill, that it is in reality in the hands of Mr. Maberly, we determined, after consulting with our solicitors, to refuse the payment of it, and accordingly gave for answer—'Payment refused by order of the Commercial Bank of Scotland, who are the drawers of the bill.' We trust you will approve of this step, which we thought best calculated to secure for you the chance of making good the proposed set-off. What course the holder will now pursue, of course we cannot tell: but we shall be glad to have your sanction for what we have done, and your authority for such further measures as you may wish us to adopt."

A commission of bankruptcy issued against Maberly on the 26th January, under which he was duly declared a bankrupt.

On the part of the defendants, it was contended that there was nothing in these transactions to preclude the defendants from their right of election either to claim the 760*l.* from the Commercial Bank or to set it off pro tanto against

their own acceptance. For the plaintiff it was submitted, that, when the defendants had returned the bill, protested and receipted, to the Commercial Bank, they ceased to have any interest in the bill, which then became the property of the former; and consequently the defendants had no right of set-off.

The Lord Chief Justice told the jury, that, if the defendants had settled their account with the Commercial Bank as to this bill for 760*l.*, and intended to close the transaction, they could not afterwards use the bill as a set-off: and he left it to the jury to say whether or not the defendants did intend to close the transaction when they remitted the bill with the protest to Scotland. The jury found in the affirmative, and accordingly returned a verdict for the plaintiffs for 760*l.*

Mr. Serjeant *Stephen*, on the part of the defendants, on a former day in this term, in pursuance of leave, obtained a rule nisi for a nonsuit.—In order to change the property in the bill, so as to exclude the defendants' right of set-off, the acts done with respect to it must have received the sanction and concurrence of the prior indorsers, the Commercial Bank; and this never was obtained. The receipt and protest were matter of form, which the defendants were obliged to adopt for their own security; and the return of the bill by the Scotch bank remitted the defendants to their original situation. [Mr. Justice *Bosanquet*.—No doubt, if the Commercial Bank had also failed, the defendants would have been remitted to their original rights. Mr. Justice *Alderson*.—The question is whether the defendants can, after having made their election by returning the bill to the Commercial Bank and debiting their account with the sum, in order to oblige them retain the bill for the purpose of setting it off against the bankrupt's claim upon them.] The cases of *Roper* v. *Birk-*

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beck (*a*), *Fernandez* v. *Glynn* (*b*), and *Wilkinson* v. *Johnston* (*c*), are authorities to shew that the act of cancelling an indorsement does not preclude a party from afterwards setting up a claim upon the bill.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie* now shewed cause.—The whole course of the evidence and the correspondence between the parties shews that the defendants are not the bona fide holders of this bill; but that, on the contrary, they hold it on behalf of the Commercial Bank, who through their means seek to obtain an advantage at the expense of the rest of Maberly's creditors. The return of the bill to the defendants did not make them holders for value. There can be no doubt as to the intention of the defendants to close the transaction when they debited their correspondents with the amount of the bill and returned it to them receipted: and there is no evidence of the transaction having become opened again. In *Fair* v. *M'Iver* (*d*), where third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due), but without communicating to the trader that they were the holders of his acceptance; the trader having become bankrupt, and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, it was held that the latter could not set off the bankrupt's acceptance, which they did not hold in

(*a*) 15 East, 17.
(*b*) 1 Camp. 426, n.
(*c*) 5 Dow. & Ryl. 403; S. C. 3 Barn. & Cress. 429.
(*d*) 16 East, 130.

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their own right, but in effect for such other persons. The principle of that case is directly applicable to the present. The 50th section of the 6 Geo. 4, c. 16, which allows the set-off of a claim against a bankrupt's estate, requires that credit shall have been given to the bankrupt by the party seeking to make the set-off. Here, the defendants are not creditors of the bankrupt.

Mr. Serjeant *Stephen*, in support of his rule.—The production of Maberly's acceptance by the defendants established a prima facie case of set-off; and there was no evidence to rebut it. The fact that they have subsequently received sufficient assets on account of the Commercial Bank is not enough to shew that they have actually paid the bill. Even supposing the defendants were not exactly remitted to their original position with regard to the bill by its return to them, the sending of it back by the Commercial Bank before Maberly's bankruptcy operated as a retransfer of it to the defendants, whereby they would acquire a new title. Besides, the Commercial Bank were the parties indirectly liable upon the 1,000*l.* bill; the defendants had accepted it for their benefit. The case is the same, therefore, as if the Commercial Bank were defendants. *Fair* v. *M'Iver* was decided on the ground of fraud—a very different case from the present.

Lord Chief Justice TINDAL.—I am of opinion that the defendants in this case, under the circumstances disclosed by the evidence, and the finding of the jury upon the point submitted to them thereon, have no right to make the set-off they claim. The action is brought by the assignees of Mr. Maberly, a bankrupt, against the defendants as acceptors of a bill of exchange for 1,000*l.*, drawn by the Commercial Bank, and by them indorsed to Maberly, and due on the 12th January, 1833. The defendants plead that Maberly, before and at the time of his bankruptcy,

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was indebted to them in the sum of 760*l*. To support that plea, the defendants put in evidence a bill for 760*l*., due on the 6th January, accepted by the bankrupt, of which they, the defendants, were at one time the holders; it having been indorsed to them by the Commercial Bank of Scotland. The question is whether there has been any payment or satisfaction of that bill to the defendants before the bankruptcy of Maberly. I am of opinion that it was legally satisfied as to them. This bill it appears became due on the 6th January, and was dishonored. On the morning of the 7th, a letter is written from the defendants to the Commercial Bank, in which letter the dishonored bill is, according to the usual course of dealing between bankers, transmitted to Scotland, with a receipt for the amount. I agree that that would not of itself be a satisfaction of the defendants' claim upon the bill, or binding on them, provided they had no funds in hand belonging to the Commercial Bank. But, observe what took place at Jones, Lloyd, & Co.'s on the 7th: instead of entering the bill when dishonored as a returned bill, they merely pass the amount to the debit side of their cash account with the Commercial Bank; and subsequently to that time the balance upon that account has been in favour of the defendants. The bill being under these circumstances remitted to Scotland, a clerk of the Commercial bank, of the name of Borthwick, in the proper and ordinary course of business, struck out the indorsement of the Commercial Bank, and proceeded to note upon the bill its return under protest, in order to its being sent back to Blackie, the manager of the branch bank at Aberdeen, by whom it had been indorsed to the Commercial Bank; when his hand was stopped by another clerk, and the bill was in this state sent back to Jones, Lloyd, & Co. The purpose for which the bill was thus sent back to the defendants appears from the letter of the 6th January, from the Commercial Bank to Jones, Lloyd, & Co., which states, after noticing the

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failure of Maberly & Co.—" There is a draft for 1,000*l.* from this office on you, No. ⅌⅌, granted on the 30th ult. at ten days' date, and payable to John Stephens, one of the persons in their bank here, which was given by us to Messrs. Maberly & Co. for the balance of an exchange of notes. This draft will be due on the 12th current, and we would wish if possible that payment of it should be declined, which we think may easily be done if it be in the hands of Messrs. Maberly & Co., or of any party who has not given value for it, or who is not a creditor of that house." Then, after observing that he expects that before this letter reaches its destination, Jones, Lloyd, & Co. may have already returned the bill to the Commercial Bank under protest, and after noticing certain circumstances connected with the failure, the writer proceeds thus: " In these circumstances we think that you would be entitled to retain the 1,000*l.* contained in our draft of the 30th ult. as a set-off for the draft for 760*l.*, and of any others which may yet be sent up to you, and of the bank-notes which we or any of our agents may have; and that the one might be offered in exchange for the other. At all events, we will trust to your doing the best *for us* in this matter, and keeping hold of the 1,000*l.* if possible." The question is, whether the defendants have by this means re-acquired a legal right to demand the amount of the bill from the bankrupts, or to set it off against a claim made upon them by his assignees. What did the defendants intend when they returned the bill to Scotland on the 7th January? That question was left to the jury, and they found that the defendants intended to close the transaction. Upon what authority, then, have they a right to re-create the debt, and set off the amount against the plaintiffs' claim in this action? It has been urged at the bar that it was a matter in their choice and discretion either to retain the bill and set it off pro tanto against their acceptance for 1,000*l.* in the hands of the bankrupt, and about to become due, or to claim payment of it from the Commercial Bank.

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But I think the rights of third persons are not to be permitted to depend upon the choice and discretion of the defendants; a choice that might vary according to the friendly or unfriendly terms upon which they might be with the prior indorsers. It seems to me that there is no reason (and no authority has been shewn) why the law of set-off should be carried to this extent; and that the finding of the jury is conclusive.

Mr. Justice GASELEE.—I am of the same opinion. A very material fact in this case is, that it is the universal course of dealing between bankers to take out of the account all dishonored bills. The only point that induced me at all to hesitate was the relative situations of the parties. Jones, Lloyd, & Co. accepted the 1,000*l.* bill for the benefit of the Commercial Bank; they might therefore with some plausibility say, that, inasmuch as they accepted the bill on account of the Commercial Bank, they also had a right as trustees to make the set-off on their account. But, can Jones, Lloyd, & Co., in answer to a claim by the assignees for a debt due from themselves, plead that another sum was due from the bankrupt to the Commercial Bank?

Mr. Justice BOSANQUET.—I am of opinion that the defendants are not entitled to set off the bill of the 6th January, accepted by Maberly, against their own acceptance of the 12th. It appears that the former bill was indorsed and remitted to the defendants by the Commercial Bank of Scotland; and that, according to the ordinary course of business, when returned to the defendants dishonored, their demand upon it was satisfied by the appropriation of money in their hands belonging to the Commercial Bank to that particular bill; or that (which amounts to the same thing) the Commercial Bank was debited with the amount in their account with the defendants; and that the bill was sent back to Scotland on the 7th of January. These facts coming before the jury, they are

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satisfied that the transaction was thereby closed. In the interim, viz. on the 6th January, the Commercial Bank, hearing of the failure of Maberly, write to the defendants, requesting them to decline payment of the 1000*l.* bill (their acceptance), and to set off against that sum the 760*l.* bill accepted by Maberly & Co. and dishonored; and conclude with saying, "At all events, we will trust to your doing your best for us in this matter, and keeping hold of the 1000*l.* if possible." This letter and the defendant's letter of the 7th, inclosing the bill with the indorsement of Jones, Lloyd, & Co. obliterated, cross on the road. On the 9th, the bill is sent back to Jones, Lloyd, & Co., in a letter from the Commercial Bank, in which they say: "We return with protest draft upon Maberly, 760*l.*, to enable you to carry into effect our views, as stated in our letter of the 6th instant." Can the defendants after this say that they are creditors upon this bill on their own account? It is clear that they did not hold the bill on their own account, but on that of the Commercial Bank, to whom they were lending their name for the purpose of obtaining indirectly an advantage which the Commercial Bank could not by other means obtain. I therefore think the bill in question cannot properly be made the subject of a set-off by the defendants. Though I do not compare the transaction which gives rise to this discussion with that in *Fair* v. *M'Iver*, still the principle upon which that case was decided is exactly the same as this; viz. that the party claiming to set off the bill was a holder as trustee only. It therefore appears to me that the only question here is, whether the defendants were at the time of claiming the set-off the holders of the bill on their own account and for their own benefit, or as trustees for the Commercial Bank: if the latter, as after the finding of the jury we must take to be the fact, they are not entitled to set it off.

Mr. Justice ALDERSON.—I am of the same opinion. If

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the transaction were closed by the return of the bill by the defendants to the Commercial Bank, there is an end of the question. Either the bill has been taken by the defendants, knowing of the failure of Maberly, with a view to setting it off for their own benefit against a debt due from Maberly to themselves, which though legal is yet a very immoral and improper act; or the claim made by them is an equitable claim as trustees for the Commercial Bank, and therefore not in the character of bona fide holders. The first supposition is negatived by the finding of the jury; and the latter would give the defendants no right of set-off.

Rule discharged.

Saturday, Nov. 23rd.

VANSANDAU and Another *v.* NASH.

Under rule 21 of Hilary Term, 2 Will. 4, the liability of bail upon their recognizance is limited to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole *the single amount* of one recognizance.

THE defendant and one John May became bail in an action brought in this Court by the present plaintiff against one Philip Browne, each of them, according to the practice of the Court, (the debt sworn to being 50*l.*), giving a joint and several recognizance in the sum of 100*l.* The plaintiffs having recovered a verdict and judgment in the action against Browne for 64*l.* 1*s.* 2*d.* debt, and 115*l.* 5*s.* 10*d.* costs, and Browne having absconded, the plaintiffs brought separate actions against the bail on their recognizance. On application to Mr. Justice Gaselee at Chambers, that learned Judge made an order, "that, upon payment or tender of the amount of the recognizance and costs of this action, and of the costs of the action against May on the same recognizance, proceedings in both actions should be stayed."

Mr. Serjeant *Wilde*, in Easter Term last, obtained a rule nisi to set aside this order, on the ground that the

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learned Judge had erred in conceiving that the 21st rule of Hilary Term, 2 Will. 4, which provides that "bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance," was intended to limit the liability of the two bail jointly to the single amount of the sum mentioned in the recognizance of each bail.

Mr. Serjeant *Talfourd*, on a subsequent day, shewed cause.—Before the making of the rule in question, by the practice of the Courts of King's Bench and Exchequer, the bail were only liable to the extent of the sum sworn to and indorsed on the process, or for any less sum the plaintiff might recover, together with the costs of the action: but, in this Court, each of the bail was separately liable to the full extent of the penalty of the recognizance, being double the sum sworn to and indorsed on the writ. The word "only" shews that the intention of the rule was to restrict and limit the greater liability of the bail that had been peculiar to this Court, to the lesser degree of liability imposed in the King's Bench and Exchequer. The fair import of the rule is, that the bail shall be liable only to the extent of the single amount of their joint recognizance. [Mr. Justice *Gaselee*.—The ground upon which I proceeded was, that I conceived the intention of the rule to be to assimilate the practice of all the Courts—to make the practice in all conformable to that which had before obtained in the Court of King's Bench.]

Mr. Serjeant *Wilde*, in support of the rule.—By the form of the recognizance in this Court, each of the bail acknowledges himself to owe to the plaintiff in the action a certain amount, and each had always before the rule been held to be liable to the full amount of his recognizance. The rule was not intended to alter that state of liability. The difference that formerly existed between

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the practice of the Court of King's Bench and this Court was this, viz. that, in the former Court, the liability of bail upon their recognizance was limited to the amount sworn to; whereas here it extended to the sum recovered in the action: and the rule was made for the purpose of restricting the liability in this Court to the sum sworn to, leaving the other question untouched. It is reasonable that the bail should know the extent of their peril as to the debt: but the amount of costs materially depends upon the steps taken by the defendant. This construction will satisfy the words of the rule, as well as the justice of the case.

THE COURT intimated an intention to consult with the Judges of the other Courts before pronouncing their decision.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an application to the Court to set aside an order of my Brother Gaselee for staying the proceedings in two actions on recognizance of bail, one an action against the defendant Nash, and the other against one May. It appeared from the affidavits that an action had been commenced by the present plaintiff against a person of the name of Philip Browne; and that Philip Browne having been arrested, the two defendants Nash and May became bail in the action—the recognizances being in 100*l.*, the double of the sum sworn to. The proceedings in the cause having lasted for a long period, the plaintiffs ultimately signed judgment for the sum of 179*l.* 7*s.*, of which 64*l.* 1*s.* 2*d.* was the amount of the debt, and the residue that of the costs. The bail having omitted to render, actions were commenced against each of the bail on their separate recognizance; and the two actions were stayed by the order

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of the learned Judge, "upon payment of 100*l.*, the amount of the said recognizance, and the costs of the actions against the bail." And the point raised on the part of the plaintiffs is, that the learned Judge ought not to have stayed the proceedings except on the terms of the bail paying the full amount of the sum sworn to, and the costs of the original action, being 165*l.* 5*s.* 10*d.*, together with the costs of both the actions brought against the bail. The question turns on the construction of the 21st rule of Hilary Term, 1832, which limits the amount of the liability of the bail. That rule is in the following terms— "Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance." Here, the amount of the sum sworn to, and costs, exceeds 100*l.*, the amount of the recognizance of each bail separately, but is less than 200*l.*, the amount of the recognizance of the two bail taken together.

After consulting the Judges of the other Courts, we have come to the conclusion, in which a great majority of the other Judges concur, that the words "the amount of their recognizance," cannot be understood to mean the amount of the two separate recognizances added together, but the amount of the sum mentioned in each of the recognizances entered into by the bail. The order of the learned Judge, therefore, appears to us to have been correct, and the rule for setting it aside must be discharged.

Rule discharged.

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In an action on the case against eighteen defendants, two of them, N. and P., suffered judgment by default; a nolle prosequi was entered as to N.; and at the trial the jury found a verdict for all the defendants except P., assessing the damages against him at 900*l.* The Court, being dissatisfied with the verdict in favour of one of the defendants, granted a new trial as to him, on payment of the costs of all the defendants except P.; and also directed a re-assessment of damages as to P., with a proviso that on such re-assessment the damages against him should not exceed the 900*l.*

PRICE *v.* HARRIS and Seventeen Others.

THIS was an action on the case brought against the defendant Harris and seventeen other persons, for an injury in the nature of waste done to the plaintiff's reversion. Two of the defendants, viz. Newbury and Proctor, put in no plea; all the other defendants pleaded the general issue, and five of them pleaded also a special plea, to the form of which it is unnecessary on this occasion to advert. The plaintiff joined issue on the two pleas, entered a nolle prosequi as to Newbury, and signed judgment by default against Proctor. The cause was tried at Guildhall before Mr. Justice Gaselee, when the jury found a verdict for all the defendants except Proctor, who had suffered judgment by default, and assessed damages against him at 900*l.*

Mr. Serjeant *Wilde*, in Easter Term last, on the part of the plaintiff, obtained a rule nisi that the verdict found for the defendants Harris, Atkins, Smyrk the elder, Smyrk the younger, and Devey, and also the assessment of damages against Proctor, should be set aside, and a new trial and assessment of damages take place.

Mr. Serjeant *Spankie*, Mr. Serjeant *Jones*, and Mr. Serjeant *Bompas*, shewed cause; and—

Mr. Serjeant *Wilde* was heard in support of the rule(*a*).

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

(*a*) The judgment being confined to a single point, it is thought unnecessary to give the arguments urged on the others that were made: and upon the point decided the course of the argument sufficiently appears in the judgment.

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The case appears to be one of the first impression, as no authority has been cited in support of the application. The plaintiff, by her own voluntary act, has included a great number of persons in the action against whom there was no ground of complaint: indeed, the very form of the application admits, that, out of seventeen defendants for whom a verdict of acquittal has passed, such verdict ought to stand as to twelve. A motion, therefore, that a verdict should be set aside as to some of the defendants, and not as to all, where the difficulty in point of form is one created by the plaintiff herself, involves consequences which should be well considered before such motion is allowed. In the case of *The King* v. *Mawby*, Bart., and Others (*a*), the new trial was granted on the application of *some of the defendants only*, where such defendants appeared to the Court to have been convicted on improper evidence. Such an application, therefore, in a criminal case, on the part of defendants found guilty, can scarcely be considered an authority for an application on the part of the plaintiff against some of the defendants in a civil case, where such defendants have been found not guilty. At the same time, looking at the consequences on the other side, it might in some instances operate a great hardship if the rule were laid down, that, where the plaintiff has, through mistake or inadvertence, improperly joined one single defendant, and the jury have acquitted all, such verdict of acquittal of all the defendants, against the clear evidence of the case as to some of them, must of necessity stand. Because, as the verdict, if allowed to stand, would be a bar to any further action, such a decision might have the effect of depriving the plaintiff of a just remedy for his damages, however large the amount, upon no other ground than that of a casual mistake. A rule of practice, therefore, which might produce consequences so obviously unjust,

(*a*) 6 Term Rep. 619.

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ought to be shewn to be clearly and rigorously established by precedent, before it is applied (a). On the present occasion, the Court are dissatisfied with the verdict in favour of Harris, one of the defendants, and think the case, as to him, ought to be submitted to the consideration of a new jury. But, feeling at the same time that the plaintiff has brought herself, by her own improper act of joining other defendants unnecessarily, into the difficulty of applying for the present rule against some, instead of all the defendants, they think they meet the justice of the case if they put the plaintiff as nearly as possible in the same situation as if she had been nonsuited at the trial, instead of having the verdict against her; and, with this view, they think the plaintiff ought to pay the costs of all the several defendants (except Proctor, who has suffered judgment by default) as if upon a nonsuit; that she should enter a nolle prosequi as to all the defendants except Harris and Proctor; and that she should then be allowed to proceed to a new trial against the defendant Harris. At the same time, they are of opinion that Proctor, who has not joined in opposing this application, ought not to be prejudiced by any new assessment of damages, but that the sum already assessed against him should be considered the maximum to which he can be made liable; so that, although he may be liable to less, if upon the new trial the jury find less against the other defendant, he shall not under any circumstances be charged in execution for more.

Upon shewing cause against this rule, considerable dis-

(a) "In trespass and false imprisonment against several defendants, the plaintiff had a verdict, and afterwards it was moved for a new trial, because as to one of the defendants the verdict was against evidence. *Sed per Curiam.* —This cannot be done; for, the Court cannot set aside the verdict as to some and not as to others; and to grant a new trial as to all would be a prejudice to those who are duly acquitted." *Sir Charles Berrington's* case, 3 Salk. 362.

cussion took place as to the effect of a deed produced in evidence—the defendants contending that, by the operation of such deed, the legal reversion was shewn to be out of the plaintiff. Whether such was the effect of the deed or not, will, as it appears to us, be better discussed on a second trial; for, it seems, on the evidence, that the production of the deed was to a certain extent a surprise on the plaintiff; and some of the uses declared by that deed being contingent, and others temporary only, the plaintiff ought to have the opportunity of shewing, if she can, that they have either not taken effect at all, or have ceased.

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Upon the terms, therefore, above mentioned, we think the rule for a new trial against Harris, and for a new assessment of damages against Proctor, ought to be made absolute.

Rule absolute.

MENDIZABAL *v.* MACHADO.

Wednesday, Nov. 20th.

On the presentment for acceptance of certain bills of exchange, the drawee said that he would have accepted them if he had had funds (meaning the fund on account of which the bills were drawn); that he had not been able to obtain those funds from France; but that when he did obtain them he would pay the bills:—*Held*, that this amounted to a conditional acceptance of the bills; and that the defendant, having subsequently become possessed of the fund in question, was bound to pay the bills.

THIS was an action of assumpsit on thirty-seven bills of exchange drawn at Cadiz, in 1822, by one Gandiola upon the defendant, and indorsed to the plaintiff. At the trial before Mr. Justice Park, at the first Sitting in London during the present term, the facts proved were as follow:—In the year 1822, a treaty was entered into between the governments of France and Spain, under which a sum exceeding 200,000*l.* was transferred to the defendant, who was the Consul-General and accredited agent of the King of Spain at the French Court, to meet certain claims made by Spanish subjects on the French government for losses sustained by the former in the war between those two countries in 1808, and which the French government, by

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the treaty of 1814, bound themselves to pay. Shortly after this took place, the Spanish constitutional government being in want of money, the plaintiff, at the request of Gandiola, the Spanish finance minister, advanced a large sum of money on the security of the fund supposed to be in the hands of the defendant: whereupon Gandiola, by the direction of the King of Spain, and with the authority of the Cortes, drew the bills in question upon the defendant. The defendant refusing to accept the bills, they were protested. In May, 1825, the defendant being arrested in this country at the suit of the plaintiff for the amount of the bills, the money was paid into Court.

A witness named Vigers, an English merchant, deposed to a conversation that he had had with the defendant on the subject of these bills after his arrest; in the course of which the latter said, that, if he had had the means, he would have accepted the bills when presented; but that he had not then been able to get the money from France; that he, the defendant, had told the plaintiff's clerk, that he would pay the bills when he got the funds: and he added that he would have paid them subsequently, but for what he considered the intemperance of the plaintiff, and the reports circulated by him derogatory to his (the defendant's) honor. The witness also stated that the defendant had never mentioned that he had received any countermand from Spain since the destruction of the constitutional government, nor did he allude to the altered state of affairs in that country as a reason for the nonpayment of the bills. It was admitted that the funds had come to the defendant's hands.

The learned Judge told the jury that a bill of exchange might be accepted by parol, and that it might also be conditionally accepted; and that if they believed the conversation deposed to by Vigers, it amounted to a conditional acceptance, and that the condition was afterwards performed, and the plaintiff consequently entitled to recover.

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The jury returned a verdict for the plaintiff for 146,000*l.*, the amount of the bills and interest.

Mr. Serjeant *Jones* now moved that this verdict might be set aside and a new trial had, on the ground that the evidence did not disclose a sufficient acceptance of the bills to entitle the plaintiff to sue on them; the admissions made by the defendant in the conversation with Vigers not having been made at the time of the presentment of the bills.

Lord Chief Justice TINDAL.—I am of opinion that the facts proved in this case did amount to a conditional acceptance of the bills; and therefore, that, it appearing at the trial that the condition had been performed, it must be taken that the bills were actually accepted. In *Pearson* v. *Dunlop* (*a*), it was held, that, if the drawee of a bill of exchange says he cannot accept it *till* stores are paid for, it is an undertaking to accept *when* the stores are paid for. What is that in terms but the present case? Before the trial, it is admitted, the defendant was possessed of the funds. From that moment, the bills were virtually accepted.

The rest of the Court concurring—

Rule refused.

(*a*) Cowp. 571.

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Saturday, Nov. 25th.

A cause being referred, the arbitrator in 1825 received from the plaintiff's attorney 87*l.* for his fees and expenses. In 1827, the parties went before the Prothonotary, when he allowed only 35*l.* The defendant now, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim), applied to the Court to order the arbitrator to refund the difference:—*Held*, that the application was too late.

BRAZIER *v.* BRYANT.

MR. Serjeant *Bompas*, on a former day in this term, obtained a rule calling upon an arbitrator to shew cause why he should not pay over to the plaintiff a sum of 52*l.*, which it was alleged he had been overpaid. The circumstances out of which the motion arose were these:—The cause had been referred in the year 1825, when the arbitrator received from Mr. Carter, the plaintiff's attorney, (since deceased), 87*l.* for his fees and expenses. In the year 1827, the parties went before one of the Prothonotaries, who allowed only 35*l.* The present application sought to compel the arbitrator to refund the difference.

Mr. Serjeant *Taddy*, contra, submitted that the application came too late, more than six years having elapsed (which would be an answer to an action brought to recover back the money), and Mr. Carter, who might have explained the transaction, having died in the interim.

Mr. Serjeant *Bompas* contended that the objection as to the lapse of time would apply with at least equal force in the case of an attorney's bill, which the Court nevertheless had opened after an interval of ten years (*a*).

Lord Chief Justice TINDAL.—I am of opinion that we ought not to entertain this motion. The transaction out of which it arises took place in the year 1825—eight years since: and no application has been made to the Court until the present term, notwithstanding the parties had their

(*a*) See *Ex parte Shipden*, 6 Dow. & Ryl. 338, where, more than seven years having elapsed after the settlement of transactions between an attorney and his client, the Court refused to interfere to have them re-opened, in the absence of any suggestion of fraud or misconduct.

attention called to the matter when they went before the Prothonotary in 1827. Besides, Mr. Carter, who could probably have thrown some light upon the affair (he having paid the money) is now dead. It seems to me, that, in acceding to an application of this sort after so great a lapse of time, we should be holding out premium dormientibus. If the arbitrator has really received too much, I am not aware that he is not liable to an action. The party may therefore if he please take his action, with all its consequences.

Mr. Justice GASELEE.—The Court are not to be understood as laying it down that the statute of limitations is the guide in such cases: all they mean to say is, that they exercise their discretion in refusing to rip up stale transactions; by analogy to cases on annuities.

Mr. Justice BOSANQUET concurred.

Mr. Justice ALDERSON.—This is an application to the discretion of the Court, and I do not think it would be a sound exercise of our discretion to interfere. How can we infer any thing improper in the conduct of the arbitrator, when the parties have slept so long? The motion being delayed until after the death of Carter, induces some suspicion; and I think the Court would not do its duty to its officers if it did not protect them under such circumstances.

Rule discharged, with costs.

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The plaintiff demised to the defendants certain machinery and premises at a yearly rent; the lease containing a proviso that the defendants should be at liberty to retain the rent, or any part thereof, upon giving the plaintiff a bond conditioned for the payment at the end of the term of the sum so retained, with interest. The defendants being in arrear for five quarters, and having omitted to give the bond, the plaintiff brought actions for the recovery of the amount. The Court refused to stay the proceedings on the terms of the defendants giving a bond and paying the costs of the actions.

JONES *v.* WINGFIELD and Another.

THE plaintiff demised to the defendants certain machinery for the term of seventeen years from July, 1832, the defendants covenanting to pay a rent of 1200*l.* per annum by monthly payments of 100*l.* each, and also 1100*l.* by four quarterly payments. The deed contained a proviso that the defendants might be at liberty to retain the last-mentioned rent, or any part thereof, upon giving the plaintiff a bond conditioned for the payment at the end of the demise of the sum so retained, with interest. The 1200*l.* rent was duly paid; but the defendants were in arrear for five quarters of the 1100*l.* rent, ending in October last, and had not tendered a bond in lieu thereof according to the proviso in the deed. The plaintiff thereupon brought two actions against them—one for the first four quarters; the other for the last quarter.

Mr. Serjeant *Wilde*, on a former day—upon an affidavit stating that the defendants had through inadvertence omitted to execute a bond; that they would have executed it in due time had they been aware that it was required of them; and that since the commencement of the suit they had executed and tendered to the plaintiff a bond for the amount retained and to be retained in future—obtained a rule nisi to stay the proceedings in the two actions, on giving the bond and payment of costs.

Mr. Serjeant *Stephen* now shewed cause.—The Court has no jurisdiction. There is no pretence for calling this a penalty: it is a mere reservation of rent. The statute of Anne, on which the jurisdiction of the Court arises in the case of bonds, has nothing to do with this case.

Mr. Serjeant *Wilde* was heard in support of his rule.

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Lord Chief Justice TINDAL.—It appears to me that we have no jurisdiction. The words of the proviso are, that the defendants shall be at liberty to retain the rent of 1100*l.* a-year, or any part thereof, upon executing to the plaintiff a bond conditioned to pay at the end of seventeen years, with interest, whatever they so retain. If the bond had been executed, that would have been an answer to the action; but we are called upon to furnish the defendants with an answer which their own laches had deprived them of. It does not appear that any thing has been done by the plaintiff to mislead the defendants: no bad faith is imputed to him; nothing but a mere omission to call upon the defendants for the bond.

The rest of the Court concurring—

Rule discharged, with costs.

VENAFRA *v.* JOHNSON, Clerk.

Monday, Nov. 18th.

In an action against a defendant for having without reasonable or probable cause preferred a complaint against the plaintiff before a magistrate, and caused him to be imprisoned and held to bail, on a charge of having threatened to do the defendant some bodily harm, the question whether or not there was reasonable or probable cause for the complaint, is one of law; but the facts, where they are conflicting, must be first ascertained by the jury.

THIS was an action on the case. The declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause whatever, caused a certain information to be made and preferred before the justices at a certain police office, &c., to wit, the information of one Charles Davis, whereby the said Charles Davis gave the said justices to understand and be informed that the plaintiff had menaced the defendant by saying that "he (the plaintiff) would lose half his blood, but Mr. Johnson (the defendant) should have it;" and the defendant then and

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there deposed, that, in consequence of the statement of the said Charles Davis, he, the defendant, apprehended that he went in danger of his life; and that he did not make the information from ill will or malice, but merely for the safety of his life and person: that the defendant maliciously and without reasonable or probable cause procured the said justices to issue their warrant for bringing the plaintiff before them; that he appeared before them accordingly; when the defendant maliciously and without reasonable or probable cause procured him to be confined in Tothill Fields prison for the space of forty-eight hours, until he found bail for his appearance at the Sessions, to answer such matters as the defendant should complain of against him; and that the plaintiff was ready and willing to answer any charge at the Sessions, but that the defendant made none against him. The defendant pleaded the general issue.

The cause was tried before Mr. Justice Park at the Sittings at Westminster after the last term. The evidence was in substance as follows:—The plaintiff, a dancing master, rented of the defendant, a clergyman of the Church of England, two rooms in a house in Regent Street, belonging to the latter. The plaintiff having, by posting placards in the windows, announced his intention to have subscription balls upon the premises, the defendant, conceiving it derogatory to his clerical character to permit such entertainments to take place in his house, remonstrated with the plaintiff, and caused the placards to be taken down by his servants. In the heat of an altercation upon the subject, the plaintiff was heard by Davis, the defendant's servant, to say that "he would lose half his blood but Mr. Johnson should have it." This being repeated to the defendant, he, on the 17th March, 1831, proceeded with Davis to the Marlborough Street police office, and there lodged the information complained of, and

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obtained from the sitting magistrate a warrant for the apprehension of the plaintiff. The plaintiff, on receiving notice of the warrant, voluntarily attended at the office to explain the language imputed to him. On the parties appearing before the magistrate (it appearing from the discussion that the defendant's object was to abate the nuisance he complained of), he required the plaintiff to give bail to answer any charge the defendant might prefer against him at the Sessions; but he recommended the parties to retire and settle the matter. The defendant accordingly proposed to withdraw the charge upon the plaintiff's quitting the premises by four o'clock in the afternoon, and undertaking to pay the rent up to the next quarter day. In pursuance of an agreement to this effect, the plaintiff caused his goods to be removed from the premises; but, when that was done, it was found that the defendant had left town, and therefore the magistrate, having received no communication from the defendant, refused to discharge the plaintiff; and he was accordingly committed to Tothill Fields prison, whence he was liberated next day, on procuring the required bail. The officer to whom the warrant was directed proved that the defendant told him that he only wanted to abate the nuisance arising from the plaintiff's advertising subscription balls to be given in his house.

On the part of the plaintiff it was contended that the evidence disclosed a total want of reasonable and probable cause for the course pursued by the defendant, and that his conduct throughout clearly shewed that his complaint was colourable and made for the mere purpose of getting rid of what he conceived to be a troublesome tenant. For the defendant it was submitted that there was nothing in the evidence to shew a want of probable cause; and *Willans* v. *Taylor* (*a*) was cited. There, in an action

(*a*) 3 Moore & Payne, 350; S. C. 6 Bing. 183, affirmed on error in K. B. See *Taylor* v. *Willans*, 2 Barn. & Adolph. 845.

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on the case for maliciously indicting the plaintiff for perjury, it was held that malice and a want of probable cause in the defendant must concur; and that the plaintiff must produce some evidence to shew a want of probable cause before he can call upon the defendant to prove the affirmative, and shew that he had reasonable and probable cause.

The learned Judge intimated an opinion that the defendant had reasonable and probable cause for the proceedings he had taken: but he thought there was nothing to go to the jury; and accordingly the plaintiff was nonsuited.

Mr. Serjeant *Spankie*, on a former day, obtained a rule nisi that this nonsuit might be set aside and a new trial had, on the ground that the question whether or not the defendant had reasonable and probable cause for putting the law in motion as he did, was a mixed question of law and fact, and therefore one upon which the Judge had no power to decide without the assistance of the jury. He relied on *Davis* v. *Russell* (*a*).

Mr. Serjeant *Jones* now shewed cause.—To entitle the plaintiff to maintain this action, he is bound to shew both the existence of malice and the absence of probable cause—*Willans* v. *Taylor*. The issuing of the warrant was the act of the magistrate, who was the person to decide upon the evidence before him whether or not there was probable cause for the complaint. [Lord Chief Justice *Tindal*.—The true question is, whether the defendant did not make the charge colourably and for an illegal purpose.] In *Davis* v. *Hardy* (*b*), upon the trial of an action for maliciously indicting the plaintiff without reasonable or probable cause, the plaintiff proved a case which in the

(*a*) 2 Moore & Payne, 590; S. C. 5 Bing. 354.
(*b*) 6 Barn. & Cress. 225.

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opinion of the Judge shewed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and, that being proved, the Judge was of opinion that there was reasonable and probable cause for preferring the indictment. It was held that, there being no contradictory testimony to that fact, and there being nothing in the demeanor of the witness who proved it to impeach his credit, the Judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. Lord Chief Justice Abbott there said: "Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." And Mr. Justice Bayley: "If there is nothing in the demeanor of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon." Here, the evidence was all on one side. The defendant's motive might have been malicious or improper, and yet probable or even actual cause might exist for procuring the plaintiff to be held to bail.

Mr. Serjeant *Spankie*, contra, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion that there was in this case a question of fact which the plaintiff had a right to require to be left to the jury. The question was whether the defendant had reasonable and probable cause for preferring his complaint against the plaintiff at the police office; and the solution of that question depends upon another, viz. whether the facts brought forward by

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the defendant in support of his complaint shewed that the defendant really and bona fide believed that he had any thing to apprehend from the supposed threat of the plaintiff. The evidence was not all on one side, as is suggested: one witness proved a conversation with the defendant in which he seems to have admitted that his object in preferring the charge against the plaintiff was, to get him out of the house. I therefore think there should be a new trial, in order that the opinion of the jury may be taken upon this point.

Mr. Justice BOSANQUET.—Whether or not the cause be reasonable and probable is undoubtedly a question of law: but before that question can arise it must be ascertained what the cause is. The manner of speaking the words attributed to the plaintiff was a fact as material to be ascertained as the words themselves.

Mr. Justice ALDERSON.—No doubt, if the plaintiff had seriously threatened the life of the defendant, though the defendant did not seriously believe that the plaintiff intended to put his threat in execution, there would still have been probable cause to justify the course adopted by the defendant. But that was a matter that ought properly to have been submitted to the jury. The fact of what is the probable cause must first be ascertained by the jury, and then the inference from the fact is for the consideration of the Judge.

Mr. Justice PARK.—I have always understood the question of probable cause to be one of law only; but, on such occasions, I have invariably told the jury that they must first agree upon the facts before I could take upon myself to decide whether or not they amounted to what the law deemed reasonable and probable cause: or, in other words, that, if they found such and such facts, then I was of

opinion there was probable cause; but, otherwise, there was not. In the present case I conceived the facts to be all one way. In this I was wrong.

Rule absolute (*a*).

(*a*) The case was afterwards tried before Mr. Justice Gaselee, in Hilary Term, 4 Will. 4, when that learned Judge left it to the jury to say whether or not the act of the defendant in lodging his complaint at the police office was bona fide and with a view to the security of his person, and not done maliciously and as a mere colour for getting the plaintiff out of the house. The jury found for the plaintiff—damages 100*l*. A rule nisi was afterwards granted for a new trial, on the grounds that the verdict was against evidence and the damages excessive; which rule was discharged in Easter Term following.

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Monday, Nov. 11*th.*

A cause was referred by an order of Nisi Prius, which contained (amongst others) stipulations that the arbitrator should be at liberty to examine either party; that the death of either should not operate a revocation of the arbitrator's authority; and that, if either party by affected delay or otherwise prevented the arbitrator from making his award, he should pay to the other such costs as the Court should think reasonable. The plaintiff died; and the defendant, after allowing the reference to proceed for a short time subsequently to his having received notice of the death, revoked the authority of the arbitrator, on the plea of his being by his death deprived of the benefit of the plaintiff's examination before the arbitrator. The Court directed the defendant to pay all the costs incurred in consequence of the revocation; it not appearing that he really contemplated deriving any advantage in the cause from the examination of the plaintiff.

IN this case, a verdict was taken for the plaintiff, subject to a reference, without prejudice to proceedings then pending between the parties in a Court of equity. By the order of Nisi Prius it was provided (among other things), that the arbitrator was to be at liberty to examine either of the parties; that the death of either party before the making of the award was not to operate a revocation of the arbitrator's authority; that the costs of the suit should abide the event of the award; that the costs of the arbitration and award should be in the discretion of any Judge or Court of equity; and that, if either party,

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by affected delay or otherwise, prevented the arbitrator from making his award, he should pay to the other such costs as the Court should think reasonable. Whilst the reference was proceeding, viz. on the 25th of March, 1833, the plaintiff died. On the 6th of April, in order to obviate the difficulty the defendant apprehended would result to him from this event, certain admissions were transmitted to him, which he retained until the 20th of May, when he revoked his submission. The order of reference was made a rule of Court in June.

Mr. Serjeant *Wilde*, on the part of the personal representatives of the plaintiff, obtained a rule calling on the defendant to shew cause why he should not pay all the costs that had been incurred by the reference.

Mr. Serjeant *Taddy* and Mr. Serjeant *Andrews* now shewed cause, upon affidavits stating the above facts; and that the defendant, conceiving it to be important that the plaintiff should be examined before the arbitrator, and finding himself by the plaintiff's death deprived of that advantage, revoked the reference.—Under the circumstances, the defendant undoubtedly had a right to revoke. In *Aston* v. *George* (*a*), a Judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the Court thought reasonable and just: the authority of the arbitrator was revoked by one of the parties, because he could not procure the attendance of material witnesses; and the Court refused to allow any costs. [Mr. Justice *Alderson*.—In that case the Court held that there was a sufficient ground for the revocation. Here, the defendant has revoked in consequence of the happening of

(*a*) 2 Barn. & Ald. 395; S. C. 1 Chit. Rep. 204.

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an event which it appears from the order was in the contemplation of the parties at the time of entering into the reference.] The order of reference does not in terms prohibit a revocation.—The Court will not act retrospectively in a case of this sort. The order of reference was not made a rule of Court until after the revocation took place. The defendant cannot therefore be in contempt.

Mr. Serjeant *Wilde*, in support of his rule.—By the order of reference it was provided that the death of a party should not operate a revocation. The defendant had notice of the death of the plaintiff on the 25th of March, and he afterwards without objection received the admissions and retained them until after he had given notice of revocation on the 20th May. There is nothing in the defendant's affidavit to induce the Court to believe that the defendant really intended to examine the plaintiff before the arbitrator: nor is any ground of excuse suggested for the revocation. In *Aston* v. *George*, as also in *Green* v. *Pole* (*b*), the Court was satisfied with the reason assigned by the party for revoking: they were prevented from proceeding by reason of the refusal of their witnesses to attend before the arbitrator.

Lord Chief Justice TINDAL.—The question in this case is, whether the defendant has wrongfully and improperly, by revoking his submission, prevented the arbitrator from going on with the arbitration. By the order of reference, it was provided that the death of either party should not operate a revocation of the authority of the arbitrator. If the defendant had intended to make the examination of the plaintiff a condition of his submission, he would have expressly stipulated for it. The order of reference, how-

(*a*) 4 Moore & Payne, 198.

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ever, only contains the ordinary words, providing that the arbitrator may, if he thinks fit, examine either party. The subsequent acts of the defendant also tend to shew that this was not the motive by which he was induced to submit; for, after he had heard of the death of the plaintiff, he allowed the reference to proceed; and when the admissions were sent to him, he retained them, instead of returning them as he would have done had he considered the arbitration to be at an end. Even now the defendant says he is ready to go on with the reference, notwithstanding the plaintiff's death. If it was so necessary to the defendant to examine the plaintiff before the arbitrator, the same difficulty still exists. Looking at all the circumstances, it appears to me that the defendant had no reasonable ground for revoking his submission, and therefore that he ought to pay all the costs that have been incurred in consequence of that step.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—In the early part of the discussion, I entertained some doubt as to whether the case did not fall within the principle of *Aston* v. *George;* whether the defendant had not really intended to examine the plaintiff, and had only revoked his submission because he was deprived by the death of the plaintiff of the opportunity of so doing: but it does not appear from the affidavits that he really did intend to examine the plaintiff with a view to this matter, but rather for the purpose of forwarding the suit in equity.

Mr. Justice ALDERSON.—This arbitration was of a very peculiar description. Where the parties intended to make special stipulations, they have made them; therefore, if the defendant had really intended it, he ought distinctly to

have stipulated for the examination of the plaintiff. Although I have had considerable experience in arbitrations, it never has occurred to me to examine either party on the request of the opposite.

Rule absolute (*a*).

(*a*) See the statute 2 & 3 Will. 4, c. 42, ss. 39, 40, 41.

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Friday, Nov. 15th.

THIS was an action of assumpsit, brought by the plaintiff, the treasurer of the trustees of the Marylebone and Finchley road, under the 7 Geo. 4, c. xc, and a partner in the banking firm of Sir Claude Scott & Co., against the defendant, one of the trustees of the road, to recover the sum of 2,000*l.* lent by the former to the latter under the following circumstances:—

The act of parliament in question applies the several provisions of the general turnpike acts 3 Geo. 4, c. 126, 4 Geo. 4, c. 95, and 5 Geo. 4, c. 69 (except as thereby altered) to the Marylebone and Finchley road; and, by the 8th section provides "that, out of the tolls and other monies which should be raised by virtue of the act, the trustees should, in the first place, and in preference to all other disbursements whatever, pay and discharge all costs and expenses relative to the procuring and passing of the

By the 3 Geo. 4, c. 126, s. 81, the trustees or commissioners of any turnpike road are empowered to borrow money at interest on the credit of the tolls arising on such road, and to mortgage the tolls and toll-houses as a security for such advances: by the 4 Geo. 4, c. 95, s. 61, the trustees are exonerated from personal responsibility in consequence of having signed any mortgage or other security "to be made by virtue or in pursuance of any act for making or maintaining any turnpike road:" and by the 7 & 8 Geo. 4, c. 24, s. 3, it is provided that no trustee shall be personally charged with the payment of any money expended in the making, repairing, or altering any turnpike road, nor shall execution issue against the goods and chattels of any trustee by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, *unless in such contract or security such trustee shall have in express words rendered himself so personally liable.* The defendant, chairman of the trustees of a turnpike road, applied to the plaintiff, the treasurer of the road, to advance to the trust 2,000*l.* as a *temporary loan:* the plaintiff placed the sum required to the credit of the trustees; but he received no such security as is provided by the 81st section of the 3 Geo. 4, c. 126:—*Held*, that the defendant was not exempted from personal liability by the 7 & 8 Geo. 4, c. 24, s. 3, the money not having been borrowed on the credit of the tolls in the manner prescribed by the statutes.

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act, and of all surveys, plans, estimates, and other expenses incident thereto: and that the remainder of all such monies should from time to time be applied in repaying any money which might be borrowed on the credit of the act, and the interest to grow due thereon, and in making, rendering commodious, improving, and maintaining in repair the said road and branch, and in otherwise carrying the act into execution."

By the 81st section of the general turnpike act, 3 Geo. 4, c. 126, it is enacted "that it shall be lawful for the trustees or commissioners of any turnpike road to borrow and take up at interest, on the credit of the tolls arising on such road, such sum or sums of money as they shall from time to time respectively think proper: and to demise and mortgage the tolls on such roads, or any part or parts thereof, and the turnpikes or toll-houses for collecting the same (the costs and charges of which mortgages shall be paid out of the tolls), as a security to any person or persons, or their trustees, who shall advance such sum or sums of money:" and a form of the mortgage deed is subjoined.

By the 4 Geo. 4, c. 95, s. 61, it is provided "that the trustees or commissioners for making or maintaining any turnpike road shall not be personally subject to or liable to be charged with the payment of any sum or sums of money by reason of their having signed or executed any mortgage or assignment by way of mortgage, or other security to be made *by virtue or in pursuance of* any act for making or maintaining any turnpike road.

By the 2nd section of the 7 & 8 Geo. 4, c. 24, it is enacted, "that every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within the act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such act or by the recited acts (3 Geo. 4, c.

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126, and 4 Geo. 4, c. 95), such trustee shall be personally liable to the trust for the repayment of the money so expended, at the suit of any person or any one trustee, or of the clerk to such trustees, on behalf of such trust; and that all the costs and charges of such suit, over and above any costs and charges recovered from the defendant in such suit, shall be paid and borne by such trust."

And by the 3rd section it is enacted "that no trustee shall be personally subject or liable to be charged (except as hereinbefore mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road; nor shall execution issue against the goods and chattels of any trustee by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, *unless in such contract or security such trustee shall have in express words rendered himself so personally liable.*"

In the month of July, 1829, at a meeting of the trustees of the road in question, the defendant being chairman, the clerk of the trustees was directed to make application to the plaintiff for a temporary loan of 1000*l.* at 5*l.* per cent.; and in the following month a similar application was made to the plaintiff for a further advance of 1000*l.* on the like terms. Both these sums were accordingly advanced by the plaintiff, who by letter gave notice to the clerk that he had placed the sums required to the credit of the trust. No security was given for these advances. In the month of October following, the trustees, being in want of more money, again applied to the plaintiff, who refused to make any further advance without security; and eventually three several sums of 1500*l.*, 500*l.*, and 600*l.*, were lent by the plaintiff (acting for the firm) on the promissory notes of the defendant and another person, also one of the trustees. These promissory notes were duly paid. In the annual account of the revenue and expenditure of the road,

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transmitted by the trustees to the clerk of the peace for the county of Middlesex, in pursuance of the 78th section of the 3 Geo. 4, c. 126, items to the following effect appeared:—"To amount of debts for which mortgages have been given,——*l.*" "To amount of monies borrowed on the security of the tolls, and for which no mortgages have been given,——*l.*" "To amount of temporary loans borrowed of the treasurer, 2000*l.*" The interest upon the 2000*l.* had been regularly paid out of the funds of the trust.

The cause was tried before Lord Chief Justice Tindal at the Sittings at Westminster after last Trinity Term. On the part of the plaintiff it was submitted that the sums sought to be recovered must be taken to have been advanced upon the personal credit of the defendant, and not on the credit of the tolls, inasmuch as the trustees had not made the trust funds chargeable therewith, the money not having been borrowed in the manner directed by the 3 Geo. 4, c. 126, s. 81. For the defendant it was contended, that, taking into consideration the whole circumstances attending the advances in question, it was clear that neither party could have contemplated any other security than that of the trust fund; and that at all events the 3rd section of the 7 & 8 Geo. 4, c. 24, discharged the defendant as trustee from personal liability, he not having in express words rendered himself personally liable.

His Lordship left it to the jury to say whether the money was advanced on the personal credit of the defendant, or on that of the trust. The jury returned a verdict for the plaintiff—2000*l.* Leave was given to the defendant to move to enter a nonsuit, on the construction of the statutes.

Mr. Serjeant *Taddy*, on a former day in this term, obtained a rule nisi that this verdict might be set aside, on the ground that it was against evidence; or that a nonsuit might be entered on the ground urged at the trial. He also objected to the mode in which the case was left to the

jury—submitting that the question was not as to what security the plaintiff looked to on making the advances, but how far the defendant had rendered himself liable personally. He cited *Allen* v. *Waldegrave* (*a*), *Lanchester* v. *Frewer* (*b*), *Sprott* v. *Powell* (*c*), and *Wormwell* v. *Hailstone* (*d*).

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge* shewed cause.—The finding of the jury, that the money was lent upon the personal security of the defendant, is fully warranted by the evidence. The 3 Geo. 4, c. 126, s. 81, gives authority to the trustees or commissioners of any turnpike roads to borrow money *on mortgage*: here the money was not borrowed in the manner prescribed, and therefore the plaintiff has no security on the tolls of the road. By the 61st section of the 4 Geo. 4, c. 95, the trustees are indemnified only where they are acting "by virtue or in pursuance of any act for making or maintaining any turnpike road:" and the 3rd section of the 7 & 8 Geo. 4, c. 24, in like manner exempts them from personal liability where they are acting in the manner authorized by the statutes. In *Sprott* v. *Powell*, the Court expressly state that they have no intention to impeach the decisions in *Horsley* v. *Bell* (*e*) and *Eaton* v. *Bell* (*f*), where the commissioners were held personally liable, they not having strictly pursued the authority under which they affected to act. In *Higgins* v. *Livingstone*, Lord Eldon says (*g*): "As to the general liability of parliamentary trustees, if I were to give an opinion I would say that when persons act under a parliamentary trust, and state themselves as

(*a*) 2 J. B. Moore, 621; S. C. 8 Taunt. 566.
(*b*) 9 J. B. Moore, 688; S. C. 2 Bing. 361.
(*c*) 11 J. B. Moore, 398; S. C. 3 Bing. 478.
(*d*) 4 Moore & P. 512; S. C. 6 Bing. 176.
(*e*) 1 Bro. Ch. Cas. 101, n.
(*f*) 5 Barn. & Ald. 34.
(*g*) 4 Dow, 355.

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so acting, they are not to be held personally liable. But this also, I think, rests on strong principle; that, as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide funds to pay the contractors." The same principle is established by *Lambert* v. *Knott* (*a*): there, by a local act for the government of the poor of the parish of G., the churchwardens and overseers and nine guardians and directors, or any five or more of them, were empowered to contract for the supply of the poor with provisions, and the parochial funds were directed to be paid into the hands of a treasurer, who was to apply the money under the orders of he governors and directors: the plaintiff contracted with the governors and directors for supplying the poor-house with goods, and acted under the orders of the churchwardens and overseers; and the Court held that the latter were personally liable.

Mr. Serjeant *Taddy* and Mr. Serjeant *Ludlow*, in support of the rule.—The uniform intention of the legislature, as expressed in each successive enactment on the subject, appears to have been to increase the protection given to public officers. The 3 Geo. 4, c. 126, s. 74, gives protection to the trustees under certain circumstances only. The 4 Geo. 4, c. 95, s. 61, extends the protection to the case of the execution by a trustee of any mortgage or other security made in pursuance of any turnpike act. And the 7 & 8 Geo. 4, c. 24, ss. 2 and 3, go further, and create an exemption in every case of money received by the trustees, where it has been expended in the making or repairing of any turnpike road: the 2nd section contemplates a misapplication of money, a breach of trust, and

(*a*) 6 Dow. & Ryl. 122.

gives a remedy on behalf of the trustees; and the 3rd section expressly provides that no trustee shall be personally charged with the payment of any sum of money laid out on the road, nor be subject to execution by reason of his having acted as trustee or signed any contract or security relating to the road, *unless in such contract or security such trustee shall have in express words rendered himself personally liable.* In *Wormwell* v. *Hailstone*, it was expressly decided, that, where the trustees under a road act are sued in the name of their clerk, in pursuance of the 3 Geo. 4, c. 126, s. 74, the property of the clerk is not liable to be taken in execution to satisfy the judgment. [Lord Chief Justice *Tindal.*—In that case the contract was entered into in accordance with the act of parliament: here it is otherwise.] The 3 Geo. 4, c. 126, s. 81, empowers the trustees to borrow money on mortgage: but there is nothing in the act to prohibit them from borrowing, and nothing illegal in their borrowing, money otherwise than on the securities mentioned in that clause. The language of Lord Eldon in *Higgins* v. *Livingstone* does not apply; for, here the person with whom the defendant contracted knew the state of the fund, he being the treasurer of the road: the contract, therefore, was made between persons having equal means of knowledge. The fact of the plaintiff's having required the personal security of the defendant for the advances of 1500*l.*, 500*l.*, and 600*l.*, shews clearly that he did not conceive that he had the personal security of the trustees for the 2000*l.* he had previously lent: and the circumstance that the plaintiff had paid himself the interest out of the trust funds in his hands as treasurer, is conclusive to shew that he looked to the security of those funds.

Lord Chief Justice TINDAL.—The first ground upon which this case is moved is, that the jury have given a verdict contrary to the evidence. The question left to them

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was, whether the money, to recover which this action is brought was advanced upon the personal security of the defendant, or upon the security of the trust. They found that it was advanced upon the security of the defendant personally: and the question now is, whether, upon the evidence given at the trial, that finding is wrong. I am of opinion, upon reconsidering the evidence, and having heard the arguments urged at the bar against the finding, that the jury came to a right conclusion. I agree that there would have been considerable doubt had the point rested upon the first application for the loan; but any ambiguity that occurs in the language used by the parties may be explained by their subsequent conduct. The first piece of evidence given was extremely strong: the document in which the advance of the 1000*l.* is stated to be by way of a *temporary loan* borrowed of the treasurer. The statement of debts and credits of the trustees is still more distinct. We find there the following items:—"To amount of debts for which mortgages have been given upon the tolls,——*l.*"—"To amount of monies borrowed on the security of the tolls, and for which no mortgages have been given,——*l.*"—"To amount of temporary loans borrowed of the treasurer, 2000*l.*" There must have been a distinction made in the mind of the persons who signed this statement, between the money borrowed on mortgage and this temporary loan borrowed from the treasurer. Looking at the nature of the trust, and the powers conferred by the act upon the trustees, unless they were enabled to borrow or raise money otherwise than on mortgage, we can see no means by which the plaintiff could obtain the repayment of this loan. By the 81st section of the statute 3 Geo. 4, c. 126, the trustees or commissioners of any turnpike road are empowered to borrow and take up at interest on the credit of the tolls arising on such road such sum or sums of money as they shall from time to time think proper, and to demise and mortgage the tolls

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on such road, or any part or parts thereof, and the turnpikes and toll-houses for collecting the same, as a security to any person or persons, or their trustees, who shall advance such sum or sums of money: and that clause also gives the form in which the mortgage is to be conceived. The 4 Geo. 4, c. 95, s. 60, gives a mode of paying off mortgages by lot. Here, therefore, we find a particular course pointed out in which the property of the trustees is to be pledged for the debts of the trust, and in which such debts are to be satisfied. In the present instance, neither of these directions have been complied with; and the plaintiff has no remedy for the recovery of the sums advanced by him, unless he can recover them in this action. On the part of the defendant it has been contended, that, where the parties had the personal security of the trustees in view, the course adopted by them has been different; for that, on the occasion of the loans of the 1500*l.*, 600*l.*, and 500*l.*, promissory notes were given by some of the trustees: and it is thence concluded that the parties must in the former instances have contemplated a dealing with the trust. That, however, is no just inference from the premises. The latter loans were not obtained from the plaintiff, but from Messrs. Scott & Co., the bankers of the trust: independently of which, the securities given for them were negotiable. If the jury were right in finding that the credit was given to the defendant personally, as I think they were, I am also of opinion that the other objection, arising on the construction of the statutes, is untenable. The acts contemplate only a case where the trustees have exercised the powers given by the acts creating them. Such is the language of the 61st section of the 4 Geo. 4, c. 95, which enacts "that the trustees or commissioners for making or maintaining any turnpike road shall not be personally subject to or liable to be charged with the payment of any sum or sums of money by reason of their having signed or executed any mort-

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gage, or assignment by way of mortgage, or other security to be made *by virtue or in pursuance of any act* for making or maintaining any turnpike road." It being afterwards thought that that provision fell short of the remedy intended by the legislature, the difficulty was removed by the 7 & 8 Geo. 4, c. 24, which is to be taken in pari materia with, and the 2nd and 3rd sections of which are virtually engrafted upon, the former act. Section 2 enacts "that every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within the act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such act or by the said recited acts (3 Geo. 4, c. 126, and 4 Geo. 4, c. 95), such trustee shall be personally liable to the trust for the repayment of the money so expended, at the suit of any person, or any one trustee, or of the clerk to such trustees, on behalf of such trust." And section 3, "that no trustee shall be personally subject or liable to be charged (except as next thereinbefore mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road, nor shall execution issue against the goods and chattels of any trustee, by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have in express words rendered himself so personally liable." In order to decide this case, it seems to me to be enough to say that there has been no attempt on the part of the defendant as trustee of the road in question to pursue the powers given by the act of parliament. On both points, therefore, I am of opinion that the rule ought to be discharged.

Mr. Justice GASELEE.—I am not prepared to say that

the jury have come to a wrong conclusion in finding that the money was advanced on the personal undertaking of the defendant. It is clear that the loan was not intended to be a loan in pursuance of the powers vested in the trustees by the act. The power given to the trustees is to raise money on mortgage. Here, the application was for a temporary loan only. It was therefore a question for the jury, whether the parties by their conduct did not evince an intention to depart from the prescribed mode of borrowing: and I think the facts warrant the conclusion they have come to.

Mr. Justice BOSANQUET.—The first question is one of fact, whether the jury have come to a wrong conclusion in finding that the money sought to be recovered in this action was advanced on the personal security of the defendant. Now, I do not find in the acts referred to any authority vested in the trustees to give a security for the repayment of a *temporary loan:* and, if they could not give such security, the finding of the jury is correct. The argument urged on the part of the defendant, that the resolution signed by the chairman in relation to the application for the loan of this money, shewed that it was the intention of the parties that the trust fund alone should be held responsible for its repayment, was a very proper topic to address to the jury; though they do not seem to have attached much weight to it. It does not follow, that, because the trustees are authorized to borrow money in a particular manner, the plaintiff is in this case bound to look to other security than that of the borrower. I am clearly of opinion that there is no pretence for calling upon the Court to interfere to set aside this verdict on the ground that it is against evidence.—The second question is whether by the acts referred to the defendant is entitled to any exemption from personal liability under the circumstances of this case. The only material clauses to be

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considered are the 61st section of the 4 Geo. 4, c. 95, and the 3rd section of the 7 & 8 Geo. 4, c. 24. I agree with my Lord Chief Justice that these statutes are to be taken in pari materia and explanatory of each other. The latter enactment operating as it does upon the former, the proper construction of the two appears to me to be this, that, notwithstanding a trustee's signing or authorizing any contract or security in relation to the road, such trustee shall not be personally liable, unless he chuse to render himself by express words so liable. But then the contract or security must be one that the party enters into in his representative capacity, and one that he is authorized to make. If a trustee enters into a contract that is not warranted by the act, his liability is the same as that of any other person: it does not follow that, because he is a trustee, every contract he enters into is entered into in that character. The manifest object of the legislature was to protect persons who fill the office of trustees, where they are acting in the due and proper discharge of their duty. If they act personally, they must abide the consequences.

Mr. Justice ALDERSON.—I am of the same opinion. Whether a verdict be or be not against the weight of evidence, the Court will not set it aside provided there be reasonable evidence to warrant a verdict as well on the one side as on the other. Here, there are reasonable and plausible arguments either way; and upon full consideration the jury have determined that the defendant is personally responsible. With that determination my Lord and my learned Brothers are not disposed to quarrel; and I entirely concur with them. The fact that bears the strongest upon my mind is, that the loan was confessedly intended to be temporary only; and I do not see how it could be a temporary loan unless the defendant incurred a personal responsibility.—The second question is, whe-

ther, supposing that the defendant did intend to contract a personal liability, he could by law so contract. With respect to the two first-cited acts, the 3 Geo. 4, c. 126, and the 4 Geo. 4, c. 95, they do not seem to me to apply. A trustee who merely signs a contract as trustee would fall within the cases cited on the part of the defendant. By the first part of the 3rd section of the 7 & 8 Geo. 4, c. 24, a general personal irresponsibility is given to trustees, by reason of their having acted as trustees, or having signed or authorized any contract or security to be entered into relating to any road, *unless in any such contract or security such trustee shall have in express words rendered himself so personally liable.* It is said that here there are no express words by which the defendant has rendered himself personally liable. But I am of opinion that this defendant is not within the exemption. The 3rd section must be construed with reference to the second. If a trustee misapplies the money of the trust, he is made personally responsible to his co-trustees. The 3rd section shews that the personal liability intended by the act was not general, but only in the cases provided for by the 2nd section. The situation of trustees before the passing of the 3 Geo. 4, c. 126, explains what it was that the legislature apprehended (though without foundation), and intended to remedy. They (the trustees) were liable to actions for any thing done in pursuance of their duty; and, as they were liable to be sued in respect of contracts made for the repair of roads, &c., it might seem that all the consequences attending such liability must follow—that a plaintiff might proceed to execution against them; leaving them to seek indemnity from the trust funds. That was thought to be an unjust situation to place a trustee in; and the statute 7 & 8 Geo. 4, c. 24, was passed to remedy that injustice. That act passed before the decision of *Wormwell* v. *Hailstone* by this Court, where it was held, that, where the trustees under a road act are sued in the name of their

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clerk, in pursuance of the 3 Geo. 4, c. 126, s. 74, though the plaintiff might proceed to judgment, he could not sue out execution against the personal effects of the clerk. If that decision had taken place prior to the passing of the 7 & 8 Geo. 4, c. 24, that enactment would probably have been thought unnecessary. It therefore appears to me that the acts of parliament referred to have nothing to do with this case; and that, as the verdict is right, and the finding is not controlled by any principle of law, the rule for setting it aside must be discharged.

Rule discharged.

REX *v.* The Sheriff of ESSEX, in a Cause of LEVY *v.* PAINE.

Monday, Nov. 18*th.*

A defendant arrested upon an alias capias must put in bail in the county wherein he is arrested.

A CAPIAS against the defendant in this cause had issued into Middlesex, and an alias afterwards issued into Essex. The defendant put in bail in the latter county. An attachment having issued against the sheriff of Essex for not bringing in the body—

Mr. Serjeant *Merewether*, on a former day, obtained a rule nisi to set it aside.—The affidavit stated that the defendant's attorney had been informed at the office, that, since the rule of Michaelmas Term, 3 Will. 4, s. vi, it was the practice to put in bail in the county into which the alias issued.

Mr. Serjeant *Wilde*, shewed cause.—He submitted that the attachment was regular, there being no bail in the county into which the capias issued; and that the practice since the rule referred to remained the same as it always had been.

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Mr. Secondary *Cancellor* reporting this to be so, the Court discharged the rule with costs: but, on a subsequent day (the rule of Court of this term, infra, having been made in the interim), the rule was made absolute without costs, the attachment to stand as a security.

Rule accordingly.

Regulae Generales.

BAIL.

Bail upon an alias or pluries capias.

IT IS ORDERED, That, where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule of Michaelmas Term, 3 Will. 4, s. vi. (*a*), the defendant must put in bail in the county where he was arrested (*b*).

T. DENMAN.	S. GASELEE.	E. H. ALDERSON.
N. C. TINDAL.	J. PARKE.	J. PATTESON.
LYNDHURST.	W. BOLLAND.	J. GURNEY.
J. BAYLEY.	J. B. BOSANQUET.	
J. LITTLEDALE.	W. E. TAUNTON.	

FINES AND RECOVERIES (*c*).

Fines and recoveries.

WHEREAS, by the 84th section of the statute made in the 3rd and 4th years of the reign of his present Majesty,

(*a*) Ante, Vol. 2, p. 330.

(*b*) This rule was made in consequence of the difficulty and misunderstanding in the filacer's office which occurred in the case of *The King* v. *The Sheriff of Essex*, ante, p. 870.

(*c*) These rules are (with a proviso) revoked by the rules of Hilary Term, 4 Will. 4, post, Vol. 4.

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chapter 74, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance," the Court of Common Pleas is authorized from time to time to make alterations in the memorandums and certificates in the said section mentioned.

And whereas, by the 89th section of the said act it is enacted, "That the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure; and that the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the said Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place:" Now IT IS ORDERED, that, in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words "and acknowledge the same to be her act and deed," the following words should be inserted, "And I [*or* we] do further certify that the several premises comprised in the said indenture are situate in the parish [*or* several parishes] and place [*or* places] following, that is to say, in the parishes of ——, [*as the case may be*], in the county of —— &c."

Certificate.

AND IT IS FURTHER ORDERED, that, where the acknowledgment shall be made before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of

One of the commissioners at the least not to be concerned for the parties.

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any of the parties in the transaction giving occasion to the taking such acknowledgment; and that, in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the said parties; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken shall be mentioned in such affidavit.

Inquiry to be made of married women.

AND IT IS FURTHER ORDERED, that the commissioners do inquire of married women whether they intend to give up their interest in the estate to be passed by such deed, without having any provision made for them in return for, or in consequence of their so giving up such interest; and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made; and one of the said commissioners shall state in the affidavit so to be made as aforesaid that such inquiry was made, and also the answer given thereto; and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made; and where such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

Affidavits verifying certificates.

AND IT IS HEREBY FURTHER ORDERED, that the affidavits verifying such certificate, where the acknowledgment

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is taken by a Judge or Master in Chancery, be in the form hereunto annexed marked A.; and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed marked B., with such variations only as the circumstances of the case shall render necessary.

Certificates and affidavits to be delivered within one month to the proper officer.

AND IT IS HEREBY FURTHER ORDERED, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making the acknowledgment, and that the officer shall not receive the same after that time without the direction of the Court or a Judge.

A.

Form of Affidavit verifying the Certificate where the Acknowledgment is taken before a Judge or Master in Chancery.

A. B., of ——, maketh oath and saith, that he knows ——, the wife of ——, in the certificate hereunto annexed mentioned: And that the acknowledgment therein mentioned was made by the said ——, and the said certificate signed by the said —— [Judge *or* Master], therein mentioned, in the presence of this deponent: And this deponent further saith, that the said —— was, at the time of making such acknowledgment of full age and competent understanding.

B.

Form of Affidavit verifying the Certificate where the Acknowledgment is taken by any of the Commissioners appointed in pursuance of the Act of Parliament.

A. B., of ——, in the county of ——, gentleman, one of the attornies of his Majesty's Court of ——, at Westmin-

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ster, and one of the commissioners named in the certificate hereunto annexed, maketh oath and saith, that he knows ——, the wife of——, in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said ——, and the certificate signed by the commissioners in the said certificate mentioned, on the day and year therein mentioned, at ——, in the county of ——, in the presence of this deponent; and that, at the time of making such acknowledgment, the said —— was of full age and competent understanding; and that the said —— knew the same acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made: And this deponent further saith, that he, this deponent, [*or*, the said I. K., *as the case may be, adding, if not the commissioner making the affidavit,* whose place of residence is at ——], is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the transaction giving occasion to the taking such acknowledgment: And this deponent further saith, that, in pursuance of the order made by the Court of Common Pleas, in Michaelmas Term, 1833, the said commissioners did inquire of the said —— [*or, if more than one,* of each of them the said ——] whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in return for or in consequence of her so giving up her interest in such estates; and that in answer to such inquiry the said —— declared that she did intend to give up her interest in the said estates without having any provision made for her in return for or in consequence of her so giving up her interest; which declaration of the said —— this deponent has no reason to doubt the truth of, and verily believes the same to be true, [*or*, declared that a provision was to be made for her in consequence of her giving up her interest in the said estates]: And this de-

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ponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made.

N.B.—When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.

Signed by the Judges of this Court.

END OF MICHAELMAS TERM.

THE Judges who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL, Mr. Justice GASELEE, Mr. Justice BOSANQUET, Mr. Justice ALDERSON.

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The plaintiff, clerk to the commissioners of a local lighting and watching act, drew up a contract to be executed by the defendants, who had accepted a tender for work to be done according to certain proposals of the commissioners, one of which was that the contract should be prepared by the solicitor to the commissioners, at the expense of the contractors. The defendants, as contractors, offered to execute the contract, but refused to pay the plaintiff his charges for drawing it up, on the ground that they were unreasonable. By the local act the contract, on the part of the commissioners, was required to be signed by five or more of them, which was not done; and, by the metropolitan general paving act, the commissioners are entitled to sue or be sued in the name of their clerk:—*Held*, that the plaintiff could not sue the defendants for refusing to execute the contract in his capacity of clerk, as the contract on the part of the commissioners had not been signed by five or more of them, when tendered to the defendants, as required by the local act, and as the charges made by the plaintiff on the defendants for preparing the contract were due to him in his individual character, and not as clerk to the commissioners. *Curling* v. *Johnson*, 496

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1. The defendant was arrested under a writ of capias, and discharged out of custody on the ground of a defect in the process. At the time of making the rule absolute for discharging the defendant, the Court gave the plaintiff leave to arrest him again. The plaintiff discontinued the first writ, and again arrested the defendant:—*Held*, that it was not necessary to file a second affidavit on issuing the second writ. *Richards* v. *Stuart*, 778

2. In an affidavit to hold to bail for principal and interest due on a bill of exchange, it must be made to appear that the amount due for principal is large enough to warrant an arrest. *Latreille* v. *Hoepfner*, 800

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2. Money had and received is the proper form of action in such a case. *Ibid.*

3. Payments made by the grantor on account of the annuity may be set off against the consideration money paid on the purchase, upon a record properly framed. *Ibid.*

4. Quære, whether the grantee is entitled to interest upon the consideration money—Semble, not. *Ibid.*

APPROPRIATION OF PAYMENTS.

W. & T., partners, were indebted to the plaintiff, and, after the dissolution of the partnership, T. also became indebted on his separate account to the plaintiff:—*Held*, that, in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items. *Smith* v. *Wigley*, 174

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A cause was referred by an order of Nisi Prius, which contained (amongst others) stipulations that the arbitrator should be at liberty to examine either party; that the death of either should not operate a revocation of the arbitrator's authority; and that, if either party by affected delay or otherwise prevented the arbitrator from making his award, he should pay to the other such costs as the Court should think reasonable. The plaintiff died; and the defendant, after allowing the reference to proceed for a short time subsequently to his having received notice of the death, revoked the authority of the arbitrator, on the plea of his being by his death deprived of the benefit of the plaintiff's examination before the arbitrator. The Court directed the defendant to pay all the costs incurred in consequence of the revocation; it not appearing that he really contemplated deriving any advantage in the cause from the examination of the plaintiff. *Smith* v. *Fielder*, 853

II. *Setting aside Award.*

1. A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award (but without reference to any particular state of facts), and certified that he had overruled them. The arbitrator's decision upon these points, as abstract propositions, being correct—The Court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award. *Jay* v. *Biles*, 86

2. Where a cause is referred to a layman, and he assumes to decide upon a point of law, and errs, the Court will set aside his award: but, where the arbitrator is a barrister, both the law and the fact are left to his discretion; even though a question of law arise incidentally on the hearing, which could not therefore have been in the contemplation of the parties at the time of referring. *Peryman* v. *Steggall*, 93

A cause being referred, the arbitrator in 1825 received from the plaintiff's attorney 87*l.* for his fees and expenses. In 1827, the parties went before the Prothonotary, when he allowed only 35*l.* The defendant now, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim), applied to the Court to order the arbitrator to refund the difference:—*Held*, that the application was too late. *Brazier* v. *Bryant*, 844

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The defendant was arrested under a writ of capias, and discharged out of custody on the ground of a defect in the process. At the time of making the rule absolute for discharging the defendant, the Court gave the plaintiff leave to arrest him again:—*Held*, that it was not necessary to indorse upon the second writ that the defendant therein was arrested by leave of the Court, and that it was not necessary to file a second affidavit of debt on issuing the second writ. *Richards* v. *Stuart*, 778

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The defendant, an insurance broker, had been employed by a merchant to procure policies to be underwritten upon a ship and cargo from London to St. Thomas's, with leave to call at Madeira and Teneriffe. On the arrival of the ship at Madeira, the supercargo advised the merchant of an alteration in the course of the voyage. The merchant put the letter containing the information into the hands of the defendant, with instructions to do the needful with it. The defendant accordingly procured memorandums to be indorsed on the policies, containing permission to call at certain places not mentioned in the policies. The vessel was lost at a place not covered by the memorandums. In an action against the broker for negligence in not having procured alterations conformable with the instructions contained in the letter:—*Held*, that the evidence of insurance brokers and underwriters as to what alterations of the policies a skilful insurance

broker ought, in their judgment, to have procured, having in his possession the policies, the invoices of the goods, and the bills of lading, and also the letter of the supercargo, and being instructed to do the needful—was admissible. *Chapman* v. *Walton*, 389

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The sheriff having returned a rescue of a party arrested from his bailiff, instead of himself, the Court notwithstanding granted a rule absolute in the first instance for an attachment against the rescuers. *Gobbey* v. *Dewes*, 556

ATTORNEY.

1. The Court will not on motion compel an attorney to produce for inspection a deed which he holds as a mere trustee, and which has not come to his hands by virtue of his professional character, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it. *Cocks* v. *Nash*, 164

2. A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the Court on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this Court—The Court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. *Paterson* v. *Powell*, 195

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BAIL.

I. *Where put in.*

It is ordered, that, where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule of Michaelmas Term, 3 Will. 4, s. 6, the defendant must put in bail in the county where he was arrested. Reg. Gen. M. T. 4 Will. 4.

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II. *Extent of Liability of Bail on their Recognizance.*

Under rule 21 of Hilary Term, 2 Will. 4, the liability of bail upon their recognizance is limited to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole *the single amount* of one recognizance. *Vansandau* v. *Nash*, 834

III. *Render of Principal.*

1. It is ordered, that, from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only. Reg. Gen. T. T. 3 Will. 4, 560

2. In the case of a London commission, the Court will not enlarge the time for the render of the principal until after his final examination before the commissioners. *Coombs* v. *Dod*, 817

BAIL-BOND.

Variance between Process and Bail-bond.

By the writ the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and the said S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—*Held* (on *general* demurrer to a declaration on the bond) to be no variance. *Grottick* v. *Phillips*, 132

Quære, if the demurrer had been *special?* *Ibid.*

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A person who keeps livery stables, and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and *sells to any person* generally, is a trader subject to the bankrupt law. *Cannan* v. *Denew*, 761

II. *Substitution of Petitioning Creditor's debt.*

Quære, whether an order of the Court of Review in bankruptcy (under the 6 Geo. 4, c. 16, s. 18, and the 1 & 2 Will. 4, c. 56, s. 2), for substituting another debt to support a commission in lieu of that of the original petitioning creditor, can be used to the prejudice of a party who has already brought an action in which he seeks to impeach the validity of the commission by reason of the insufficiency of the petitioning creditor's debt. *Aireton* v. *Davis*, 138

III. *Rights and Liabilities of Assignees.*

1. The sheriff seized the goods of a defendant under a *fi. fa.*, and sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:—*Held*, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen. *Balme* v. *Hutton*, 1

2. An action for money had and received lies against an official assignee appointed by the Court of Review, to recover money received by him whilst acting under a void commission, and not paid into the Bank of England as directed by the 1 & 2 Will. 4, c. 56, s. 22. *Munk* v. *Clarke*, 463

3. Quære, whether the bankrupt, who procured the appointment of the defendant to the office of assignee, could afterwards charge him with having received moneys of the bankrupt to his the bankrupt's use—Semble, not. *Ibid.*

4. By the statute 3 Geo. 4, c. 39, a warrant of attorney not filed within twenty-one days of its execution is declared to be fraudulent and void against the assignees under a commission afterwards sued out against the party giving it:—Held, that, in order to let in the objection that the statute has not been complied with, it must first appear that there is a *valid* commission against the party. *Aireton* v. *Davis*, 138

6 *Geo.* 4, c. 16, ss. 81, 82.

5. J. S., after having committed a secret act of bankruptcy, borrowed of the defendant 2700*l.*, assigning to him by way of security certain furniture and effects; with a power of sale in case of non-payment by a specified day, and a clause of redemption on payment of principal and interest. The furniture remained in the possession of J. S., and within two ca-

lendar months after the assignment a fiat issued against him:—*Held*, that the assignees might recover the value of the goods in trover; and that the transaction was not protected as a *payment* within the 82nd section of the 6 Geo. 4, c. 16. *Cannan* v. *Denew*, 761

6. A case that is within the 81st section of the 6 Geo. 4, c. 16, is excluded from the operation of the 82nd.—Per Mr. Justice Alderson, *Ibid.*

BARON AND FEME.

See COPYHOLD.

BILLS OF EXCHANGE.

1. In an action by the holder against the indorsees of a bill of exchange, who indorsed it for the accommodation of the drawer, the latter proved that he had applied to the plaintiff's step-father to get the bill discounted; that he did so, and gave him, the drawer, 32*l.* minus the amount of the bill, although the discount at 5*l.* per cent. was 1*l.* 19*s.* only:—*Held*, that a conversation between the drawer and the party who discounted the bill was not admissible in evidence on the part of the defendants, it not being shewn that such party was the plaintiff's agent; although the defendants had given the plaintiff notice to prove the consideration he gave for the bill. *Basset* v. *Dodgin*, 417

2. The defendants were the holders of a bill of exchange accepted by one M. for 760*l.* which was indorsed to them by the Commercial Bank of Scotland; and they were also the acceptors of a bill for 1000*l.* drawn by the Commercial Bank in favour of M. The former bill became due on the 6th January, and was dishonoured, M. having stopped payment. On the 7th, the defendants debited the Commercial Bank in their account with them with the 760*l.*, and wrote a receipt on the back of the bill, and returned it protested to the Commercial Bank. The latter, hearing of M.'s failure, on the 6th, wrote to the defendants, requesting them to keep the 760*l.* bill, and set off the amount against the 1000*l.*, their acceptance, which would become due on the 12th. In an action by the assignees of M. (who afterwards became bankrupt) against the defendants, as acceptors of the 1000*l.* bill:—*Held*, that they were not entitled to set off the 760*l.* *Belcher* v. *Lloyd*, 822

Parol and conditional Acceptance.

3. On the presentment for acceptance of certain bills of exchange, the drawee said that he would have accepted them if he had had funds (meaning the fund on account of which the bills were drawn); that he had not been able to obtain those funds from France; but that when he did obtain them he would pay the bills:—*Held*, that this amounted to a conditional acceptance of the bills; and that the defendant, having subsequently become possessed of the funds in question, was bound to pay the bills. *Mendizabal* v. *Machado*, 841

BOND.

1. The condition of a bond executed by the principal and two sureties in the penal sum of 1000*l.*, contained a recital that the obligor had taken a farm of the plaintiff (the obligee), subject to the payment of rent reserved in a lease of even date with the bond, and that it had *also been agreed* by the obligor and the plaintiff, that the obligor should enter into a bond with two sureties in the penalty of 500*l.* for the due payment of the rent. Rent having been found by a jury to be due to the plaintiff to the amount of 740*l.*, the Court refused to reduce the verdict to 500*l.*, to which only it was contended the

sureties could be liable by virtue of the recital in the condition. *Ingleby* v. *Mousley*, 488

Assignment of Breaches under the 8 & 9 *Will.* 3, c. 11, s. 8.

2. A bond was executed on the 17th of March, 1827, in the penalty of 10,000*l.*, conditioned for the payment of 5,000*l.* on the 17th of March, 1829, with interest in the mean time payable half-yearly, pursuant to the provisoes and stipulations contained in an indenture of assignment of even date with the bond. The defendant, after craving oyer of the bond and condition, pleaded payment according to the condition of the bond and of the provisoes in the indenture; which the plaintiff denied in his replication. The principal and interest having become due before the action was commenced:—*Held*, that it was not necessary for the plaintiff to assign breaches under the statute 8 & 9 Will. 3, c. 11, s. 8. *Smith* v. *Bond*, 528

CARRIER.

1. A manufacturer deposited goods with a wharfinger at Stockton, for the purpose of being shipped for the defendants' wharf in London, receiving from him receipts describing them. The manufacturer indorsed upon these receipts orders upon the defendants to deliver the goods on their arrival to the plaintiffs; the latter having advanced money upon them. The plaintiffs sent the receipts and delivery orders to the defendants, and demanded the goods. The defendants stated that the goods had not arrived, but promised that when they did arrive they should be forwarded to the plaintiffs:—*Held*, that the defendants, having thus assented to the plaintiffs' title to the goods, could not afterwards dispute it; and that the plaintiffs might maintain trover upon their refusal to deliver them. *Holl* v. *Griffin*, 732

2. Semble that wharfingers' receipts pass the property in the goods they represent, by indorsement, in the same manner as bills of lading. *Ibid.*

CASE.

For Negligence.

Where an injury is occasioned by the carelessness and negligence of the defendant, an action on the case is maintainable, although the injury is the result of the *immediate* act of the defendant; provided it be not a *wilful* act. Where, therefore, the plaintiff declared that the defendant carelessly, unskilfully, and improperly drove his gig against the plaintiff's cart, and damaged it:—*Held*, that such carelessness and negligence were strictly and properly the subject of an action on the case, although the act complained of was the immediate act of the defendant. *Williams* v. *Holland*, 540

CHARTERPARTY.

See SHIP AND SHIPPING.

COGNOVIT.

No taxation of costs is necessary upon a cognovit. *Clothier* v. *Ess*, 216

CONDITION PRECEDENT.

In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price and all disputes arising in or about the premises: and the defendant (the employer) agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof; and

the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction:—*Held*, that the surveyor's certificate was a condition precedent to the plaintiff's right to sue upon the contract in respect of alterations. *Morgan* v. *Birnie*, 76

CONSCIENCE, COURT OF.

See COSTS, II.—COURT OF CONSCIENCE.

COPYHOLD.

J. R., tenant of customary lands in the manor of Cheltenham, aliened them during the coverture, without his wife having been solely and secretly examined in Court, or joining in the surrender thereof:—*Held*, that, according to the custom of the manor, as settled by the 1 Car. 1, c. i, the widow of J. R. was entitled to dower out of such customary lands, although her husband did not die tenant thereof. *Riddell* v. *Jenner*, 673

COSTS.

See ARBITRATION.

I. *Taxation.*

1. On motion for a nonsuit on the ground of a variance between the declaration and the contract of guarantie therein set out, or for a new trial on the ground that the guarantie was not continuing, the Court, being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiffs for the sum secured, should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial and of the motion. On taxation, the officer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs:—*Held*, that he had done right. *Allan* v. *Kenning*, 80

2. No taxation of costs is necessary upon a cognovit. *Clothier* v. *Ess*, 216

3. It is ordered that henceforth the costs of proceedings upon writs of error from the Court of Exchequer to the Exchequer Chamber be taxed and allowed by the Master of the Court of Exchequer. Reg. Gen. Ex. Ch. M. T. 2 Will. 4, 298

II. *Suggestion to deprive Plaintiff of, under the London Court of Conscience Act, 39 & 40 Geo. 3, c. civ.*

A barrister is not exempted from liability to be sued in the London Court of Requests, under the 39 & 40 Geo. 3, c. civ. Therefore, where the defendant, a barrister, having chambers in the Temple, was sued in the Common Pleas for a claim of 6*l.* 6*s.*, reduced by the verdict to 4*l.* 4*s.*, the Court permitted him to enter a suggestion on the roll to deprive the plaintiff of costs. *Wettenhall* v. *Wakefield*, 805

III. *Under the 43 Geo. 3, c. 46, s. 3.*

1. Where there have been mutual dealings between a plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3. *Ashton* v. *Naull*, 184

2. The plaintiff arrested the defendant for 400*l.*, having previously obtained acceptances for 320*l.*, part of the debt, from the defendant's agents, to meet which remittances were made to the latter by the de-

fendant:—*Held*, that the arrest for 400*l.* was made without reasonable or probable cause, and therefore that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3. *Reynolds* v. *Flower*, 801

IV. *Of Motion under the Interpleader Act.*

1. The costs of the applicant under the interpleader act, where he has acted bona fide, will in the first instance be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful. *Ducar* v. *Mackintosh*, 174

2. A party fairly applying for relief under the interpleader act is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute. *Cotter* v. *The Bank of England*, 180

[This rule, however, does not apply to the sheriff.—*Ed.*]

V. *Under Rule 74 of Hilary Term, 2 Will. 4.*

In an action for a libel, the defendants pleaded the general issue and six special pleas of justification. At the trial, the jury found for the defendants upon the issues raised on five of the special pleas, and for the plaintiff upon the other issues. The plaintiff afterwards obtained a rule for entering judgment *non obstante veredicto* upon the issues that had been found for the defendants, on the ground that the pleas on which those issues were taken were bad in point of law:—*Held*, upon the construction of the 74th rule of Hilary Term, 2 Will. 4, that neither party was entitled to the costs of those issues. *Goodburne* v. *Bowman*, 69

(*a*) Where a writ of summons which had originally been issued into one county was afterwards (without being re-sealed) altered by the substitution of another—The Court set aside the proceedings, on payment of the debt, *without costs*, although the defendant had, before taking the objection, obtained a Judge's order for staying the proceedings on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of Court. *Siggers* v. *Sansom*, 194

(*b*) An executor suing in his representative character upon a contract made with his testator is liable to costs upon a judgment as in case of a nonsuit, where such costs have been occasioned by his *wilful default*. *Woolley* v. *Sloper*, 248

COURT OF CONSCIENCE.

See Costs, II.

The defendant, an officer of the Southwark Court of Requests, entered the plaintiff's house in search of a person against whom a warrant of execution was issued by the commissioners of that court. The party was not in the house, and the jury found that the defendant had no reasonable grounds for supposing that she was:—*Held*, that, notwithstanding, the defendant was entitled to the fourteen days' notice of action under the 21st section of the 46 Geo. 3, c. lxxxii (Southwark Court of Requests Act), as he entered the house bonâ fide in search of the party named in the warrant. *Cook* v. *Clark*, 371

COURT OF REVIEW.

Practice of.

See Bankrupt, II.

COVENANT.

The defendant, the master of a ship, let the cabins to the plaintiff for the conveyance of passengers from Calcutta to London, and covenanted (amongst other things) that he would promote in as far as in him lay the comfort and convenience of the plain-

tiff and such persons as he should engage and contract with, and who should be received as passengers in and on board of the said ship or vessel: and the plaintiff covenanted with the defendant, that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or ports, for stock or otherwise, save and except St. Helena, he the plaintiff would bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon:—*Held*, that a refusal on the part of the defendant to put into the Cape of Good Hope at the request of the plaintiff, provided such request could be complied with without endangering the vessel, was a breach of the defendant's covenant. *Corbyn* v. *Leader*, 751

DEED.

By a deed of settlement made in 1756, lands were settled by T. H. in tail male, to the use of such person as at the time of the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the use of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son, for the time being, of T. H. and A. H., who should by the death of such second, third, fourth, or other son, without issue, become a second son; and, for default of such issue as aforesaid, and in case there should be two or more daughters of T. H. and A. H., then to the use of such daughters and their heirs as tenants in common; but, in case there should be only one son of T. H. and A. H., then to the use of the eldest or only son: and for default of all such issue, to the use of T. H. in fee. T. H., the settlor, died in 1766, leaving four sons—P., who died in 1770, an infant, and without issue—C., who died in 1829, without issue—T., who died in 1783, without issue—and John, who survived:—*Held*, that, under the circumstances, John, the fourth son of the settlor, took an estate in tail general in the settled estates. *Hawkins* v. *Hawkins*, 322

DEVISE.

1. A limitation by way of executory devise, not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person whatever, is not void, as too remote, or otherwise: but twenty-one years after the expiration of a life or lives in being, is the limit, and cannot be extended by the number of months equal to the ordinary or longest period of gestation, except in cases where the gestation exists. *Cadell* v. *Palmer*, 571

2. Testator, after giving his T. estate to certain persons for life, devised it "to J. C., or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said J. C., then the above lands to fall to the first male heir of the branch of my uncle R. C.'s family, yielding and paying unto such of the daughters of the aforesaid R. C. which shall be then living the sum of 100*l.* each, at the time of the taking possession of the aforesaid estate." At the time when the will was made R. C. was dead, having left five daughters, all married. The eldest daughter of R. C. died in 1799, leaving a daughter who had a son born in 1795—the second died in November, 1820, leaving a son, born in 1770—the third died in 1813, leaving a son, born in 1773—the fourth died in 1806, leaving a son, born in 1768—the fifth survived, having a son (also living) born in 1772. J. C. died without issue in

1808. The tenant for life died in July, 1820:—*Held*, first, that the remainder to the first male heir of the branch of the family of the testator's uncle R. C., was a remainder in fee simple—Secondly (Mr. Justice Littledale dissenting), that the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living—Thirdly, that the remainder vested in interest on the death of the eldest daughter of R. C.—Fourthly—per Mr. Justice Taunton and Mr. Justice Bosanquet, that the remainder then vested in the grandson of R. C.'s eldest daughter—per Mr. Justice Littledale, that it vested in the son of the fourth daughter of R. C.—per Mr. Baron Bayley, that it vested in the son of the second daughter—per Lord Chief Justice Tindal, that the devise was void for uncertainty—Fifthly, that the remainder, if once vested in interest, could not open or become divested so as to admit another person in preference to the person in whom it had so vested. *Doe* d. *Winter* v. *Perratt*, 586

3. The word "heir" in a devise may be construed to mean "heir apparent." Per Mr. Justice Taunton, and Mr. Justice Bosanquet. *Doe* d. *Winter* v. *Perratt*, 597, 608

4. A devise to the "first male heir" of one, being followed by words of charge upon the person of the individual to whom the estate is limited, carries a fee. Per Mr. Justice Bosanquet. *Doe* d. *Winter* v. *Perratt*, 604

5. By indentures of lease and release, A. mortgaged certain farms and lands to B. in fee. B., by will, after leaving an annuity charged on his real and personal estate, and other specific devises of real property, devised all his messuages or dwelling-houses, buildings, chattels real, ready money, securities for money, all debts owing, and personal estate of any nature or kind whatsoever, save what were thereinbefore otherwise disposed of, to two trustees and the survivor, their heirs, executors, administrators, and assigns, upon trust to invest so much of the property as consisted of money in the funds or real securities, and to pay the dividends, and also the rents and profits of the last devised chattels real, to C. for life; and, after his decease, to divide the residue, or transfer the securities then subsisting for the same, unto and among the children of C. equally, share and share alike:—*Held*, that the legal estate in the premises comprised in the indentures of mortgage passed under B.'s will to the trustees therein named, by the devise of the testator's securities for money to them and their heirs; and therefore that it passed to the mortgagor, under a conveyance by the surviving trustee under the will, upon the payment of the mortgage money and interest due thereon by such mortgagor. *Mather* v. *Thomas*, 684

DISCONTINUANCE.

See PRACTICE, V.

DISTRESS.

See LANDLORD AND TENANT, III.—POOR-RATE.

DONATIO MORTIS CAUSA.

Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—*Held*, sufficient to entitle such person to take and retain possession of the property. *Royston* v. *Hankey*, 381

DOWER.

J. R., tenant of customary lands in the manor of Cheltenham, aliened them during the coverture, without his wife having been solely and secretly examined in court, or joining in the surrender thereof:—*Held*, that, ac-

cording to the custom of the manor, as settled by the 1 Car. 1, c. i, the widow of J. R. was entitled to dower out of such customary lands, although her husband did not die tenant thereof. *Riddell* v. *Jenner*, 673

EJECTMENT.

1. The xvth rule of Michaelmas Term, 3 Will. 4 (as to intituling declarations), does not apply to declarations in ejectment. *Doe* d. *Fry* v. *Roe*, 370

2. In ejectment on a vacant possession, the affidavit that six months' rent are in arrear may be made by a receiver. *Anonymous*, 751

EVIDENCE.

I. *Of Declarations and Conversations.*

1. Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—*Held*, sufficient to entitle such person to take and retain possession of the property. *Royston* v. *Hankey*, 381

2. In an action by the holder against the indorsees of a bill of exchange, who indorsed it for the accommodation of the drawer, the latter proved that he had applied to the plaintiff's step-father to get the bill discounted; that he did so, and gave him, the drawer, 32*l.* minus the amount of the bill, although the discount at 5*l.* per cent. was 1*l.* 19*s.* only:—*Held*, that a conversation between the drawer and the party who discounted the bill was not admissible on the part of the defendants, it not being shewn that such party was the plaintiff's agent; although the defendants had given the plaintiff notice to prove the consideration he gave for the bill. *Basset* v. *Dodgin*, 417

II. *Of Persons skilled in a Science or Craft.*

The defendant, an insurance broker, had been employed by a merchant to procure policies to be underwritten upon a ship and cargo from London to St. Thomas's, with leave to call at Madeira and Teneriffe. On the arrival of the ship at Madeira, the supercargo advised the merchant of an alteration in the course of the voyage. The merchant put the letter containing the information into the hands of the defendant, with instructions to do the needful with it. The defendant accordingly procured memorandums to be indorsed on the policies, containing permission to call at certain places not mentioned in the policies. The vessel was lost at a place not covered by the memorandums. In an action against the broker for negligence in not having procured alterations conformable with the instructions contained in the letter:—*Held*, that the evidence of insurance brokers and underwriters as to what alterations of the policies a skilful insurance broker ought, in their judgment, to have procured, having in his possession the policies, the invoices of the goods, and the bills of lading, and also the letter of the supercargo, and being instructed to do the needful—was admissible. *Chapman* v. *Walton*, 389

III. *Executors' Accounts.*

A book of accounts kept by a deceased executor, charging himself with the receipt of rents in his character of executor, is admissible in evidence for the purpose of shewing that he had received rent on account of a particular tenement; notwithstanding he took a remote contingent interest under the will. *Spires*, dem., *Morris*, ten., 124

IV. *Examinations before the Prothonotary under the* 1 *Will.* 4, *c.* 22.

The Court permitted the examination of a witness before the prothonotary, under the statute 1 Will. 4, c. 22 (on payment of costs), upon the affidavit of his medical attendant, who

swore that he was in a *precarious* state, and could not attend at the trial without great danger. *Pond* v. *Dimes*, 161

(*a*) In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of fi. fa. sued out on a judgment obtained against the consignor of the goods. The plaintiff replied de injuria sua propria absque residuo causæ, and new-assigned that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea:—*Held*, that, on these pleadings, it was competent for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, and under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods—Mr. Justice J. Parke, dissentiente. *Lucas* v. *Nockells*, 627

(*b*) Where a copy of a warrant of attorney has been filed under the authority of the statute 3 Geo. 4, c. 39, such copy is good evidence of the contents of the warrant of attorney—at least against the party filing it, and all claiming under him. *Sylvester* v. *Anthony*, 191

EXCHEQUER BILLS.

1. Under the statute 48 Geo. 3, c. 1, s. 10, the tenure of the office of one of the paymasters of exchequer bills is a tenure during pleasure only, and not during good behaviour or for the life of the grantee. *Smyth* v. *Latham*, 251

2. The subsequent appointment of a new paymaster in the place of a former one is a virtual revocation of the appointment of such former paymaster, even though the instrument under which the new appointment is made contains no express clause of revocation of the old one, and though it allege contrary to the fact that the former paymaster *had resigned*. *Ibid.*

3. The salary received by the substituted officer could in no event become money had and received to the use of his predecessor. *Ibid.*

EXECUTORS.

I. *Rights and Liabilities of.*

1. Where executors have continued to carry on the testator's business, and drew bills *as executors* for goods sold to the defendants, several of which bills the defendants accepted and paid:—*Held*, that the plaintiffs might sue as executors for the price of such goods. *Aspinall* v. *Wake*, 423

2. An executor suing in his representative character upon a contract made with his testator, is liable to costs upon a judgment as in case of a nonsuit, where such costs have been occasioned by his *wilful default*. *Woolley* v. *Sloper*, 248

II. *Accounts of deceased Executors.*

A book of accounts kept by a deceased executor, charging himself with the receipt of rents in his character of executor, is admissible in evidence for the purpose of shewing that he had received rent on account of a particular tenement; notwithstanding he took a remote contingent interest under the will. *Spires*, dem., *Morris*, ten., 124

EXECUTORY DEVISE.

See DEVISE, 1.

FEME COVERTE.

See COPYHOLD.

FINES AND RECOVERIES.

Amendment of.

1. Where in levying two fines between the same parties, the one sur concessit, the other sur cognizance de

droit, the parcels had by mistake been transposed, the Court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses. *Banbury*, plt., *Harper*, def., 101

2. The Court allowed a recovery to be amended by inserting "Holy Trinity" before "Kingston-upon-Hull," on an affidavit that the property intended to pass was situate in the parish of The Holy Trinity, at Kingston-upon-Hull. *Dansey*, dem., *Lee*, ten., *Crowther*, vouchee, 371

And see the rules as to fines and recoveries, p. 871.

GUARANTIE.

See COSTS, I, 1.

HABEAS CORPUS.

See PRISONER.

HUSBAND AND WIFE.

See COPYHOLD.

INFANT.

The plaintiff, a minor, agreed to enter into partnership with the defendant, such partnership to commence on a future day; and, as a security for the due performance of the agreement on his part, the plaintiff deposited with the defendant 100*l*. On attaining his majority, the plaintiff rescinded the contract, and refused to enter into the proposed partnership:—*Held*, that he was entitled to recover back the 100*l*. in an action for money had and received, he having derived no benefit from the contract, and the deposit being in the nature of a penalty, to which an infant is not liable. *Corpe* v. *Overton*, 738

INFERIOR COURT.

See COURT OF CONSCIENCE.

INSOLVENT DEBTOR.

I. *Rights and Liabilities of Assignees.*

An insolvent went to prison on the 18th of June, and, on the following day, petitioned the insolvent court for his discharge. On the 19th the sheriff seized his goods under a fi. fa. issued on a cognovit given by the insolvent to a creditor on the 11th. On the 23rd the insolvent executed the assignment to the provisional assignee, who immediately gave the sheriff notice not to sell, notwithstanding which he did so:—*Held*, that the sale was a wrongful act by the sheriff, and that he was liable to the ultimate assignee in an action of trover. *Groves* v. *Cowan*, 352

II. *Voluntary Payment or Charge.*

J. S., being indebted to the defendant, the latter wrote to demand payment, saying that he must have the money "in a few weeks," or he would put it in the hands of an attorney to get. J. S., *in consequence* of this demand, paid the debt in three weeks, and went to prison, and petitioned the insolvent debtors' court within three months afterwards:—*Held*, that this was not a voluntary payment, or fraudulent and void within the meaning of the 32nd section of the statute 7 Geo. 4, c. 57. *Reynard* v. *Robinson*, 127

2. A. being in insolvent circumstances, and having sold his goods by public auction (the proceeds remaining in the hands of the auctioneer), the defendant, under pretence of having issued a fiat of bankruptcy against A., prevailed upon the auctioneer to pay over to him the amount of his debt, and subsequently procured the assent of A. to such payment. A., more than three months afterwards, petitioned the insolvent debtors' court for his discharge under the act. In an action by his assignee to recover back the sum so paid:—*Held*, that it ought to have been left to the jury

to say whether the transaction did not amount to a voluntary charging of his estate by the insolvent, and whether he did not at the time contemplate taking the benefit of the act. *Wainwright* v. *Miles*, 211

III. *Plea of Insolvency.*

If a defendant seeks to avail himself of his discharge under the insolvent debtors' act, 7 Geo. 4, c. 57, he must plead it generally, according to the provisions of the 61st section, and cannot give it in evidence under the general issue. *Bircham* v. *Creighton*, 345

INSPECTION OF DOCUMENTS.

The Court will not on motion compel a person not a party to the suit, to produce for inspection a deed which he holds as a mere trustee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it. *Cocks* v. *Nash*, 164

Nor will the Court exercise their authority in this respect over an attorney, where the deed has not come into his hands by virtue of his professional character, *Ibid.*

INSURANCE.

See ASSURANCE.

INTERPLEADER.

See PRACTICE, VI.

JOINT STOCK COMPANY.

An act of parliament by which an insurance company was incorporated —after reciting that "difficulties had arisen, and might from time to time thereafter arise, as well in bringing and maintaining actions and suits *for recovering debts and enforcing obligations due to the said society*, and in prosecuting persons who might steal or embezzle any money, goods, or effects of or belonging to the said society, &c., by reason of its being required by law that all the several subscribers or proprietors should sue and prosecute by their several and distinct names and descriptions" — enacted "that all actions and suits commenced or instituted by or on behalf of the said society, *for recovering any debts, or enforcing any claims or demands now due or which might thereafter become due or arise to the said society*, &c., should be commenced or instituted and prosecuted in the name of the chairman or secretary of the said society as the nominal plaintiff:— *Held*, that this enactment empowered the chairman to sue on behalf of the company, to recover damages for a libel reflecting upon the trading character of the company. *Williams* v. *Beaumont*, 705

JUDGMENT.

Entering up Judgment on a Warrant of Attorney.

See WARRANT OF ATTORNEY.

LANDLORD AND TENANT.

I. *Relation of.*

The plaintiff was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do: —*Held*, that these circumstances did not constitute the plaintiff a *tenant* of the company; and therefore that he could not maintain trespass against their agent for pulling down the toll-house. *Hunt* v. *Colson*, 790

II. *Reservation of Rent.*

1. The plaintiff occupied a house as tenant to the defendant, under a demise for a year, at a rent payable quarterly, *or half quarterly if required.*

The first year of the tenancy had elapsed, and the rent had always been paid *quarterly*. The defendant afterwards, without any previous demand or notice to the tenant, distrained for a half quarter:—*Held*, that the distress was illegal. *Mallam* v. *Arden*, 793

2. The plaintiff demised to the defendants certain machinery and premises at a yearly rent; the lease containing a proviso that the defendants should be at liberty to retain the rent, or any part thereof, upon giving the plaintiff a bond conditioned for the payment at the end of the term of the sum so retained, with interest. The defendants being in arrear for five quarters, and having omitted to give the bond, the plaintiff brought actions for the recovery of the amount. The Court refused to stay the proceedings on the terms of the defendant's giving a bond and paying the costs of the actions. *Jones* v. *Wingfield*, 846

III. *Distress.*

1. A threshing machine, not a fixture, is liable to a distress for rent, unless in *actual* use at the time, or there be other sufficient distress upon the premises. *Fenton* v. *Logan*, 82

2. The plaintiff let to one J. S. a threshing machine; on Saturday afternoon J. S. ceased working it; and, the plaintiff having a considerable distance to convey it home, it was left on the premises of J. S. till the following Monday morning, when it was distrained by the landlord for rent:—*Held*, that, in the absence of proof of a sufficient distress *aliunde*, the machine was well taken. *Ibid.*

3. The plaintiff took of the defendant a house, at a *yearly* rent, under an agreement by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of *rent*, rates, taxes, or assessments;" and the former agreed, that, "from and after that day, *the same* should be kept paid by him for the period he might occupy the premises." At the expiration of the *first quarter*, the superior landlord distrained for rent:—*Held*, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a *yearly* rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *Upton* v. *Fergusson*, 88

4. A broker having distrained the goods of a tenant for rent in arrear, he signed an agreement, in writing, drawn up by the broker, that if he, the tenant, did not pay the rent on or before a given day, the broker might re-enter and distrain again:—*Held*, that this did not estop the plaintiff from afterwards complaining of an excessive distress, made in consequence of the rent not being paid at the stipulated time. *Holland* v. *Bird*, 363

IV. *Liability of an Assignee of a Lease.*

A., by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained in the original lease." B. entered under this assignment, and afterwards assigned over to a third person:—*Held*, that B. was not liable in covenant to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee—the words "subject to the payment of the rent, &c." being words of qualification, and not of contract. *Wolveridge* v. *Steward*, 561

LEASE.

See LANDLORD AND TENANT, II, 1.—IV.

LIBEL.

1. An act of parliament by which an insurance company was incorporated—after reciting that "difficulties had arisen, and might from time to time thereafter arise, as well in bringing and maintaining actions and suits *for recovering debts and enforcing obligations due to the said society*, and in prosecuting persons who might steal or embezzle any money, goods, or effects of or belonging to the said society, &c., by reason of its being required by law that all the several subscribers or proprietors should sue and prosecute by their several and distinct names and descriptions"—enacted "that all actions and suits commenced or instituted by or on behalf of the said society, *for recovering any debts, or enforcing any claims or demands now due or which might thereafter become due or arise to the said society*, &c., should be commenced or instituted and prosecuted in the name of the chairman or secretary of the said society as the nominal plaintiff:—*Held*, that this enactment empowered the chairman to sue on behalf of the company, to recover damages for a libel reflecting upon the trading character of the company. *Williams* v. *Beaumont*, 705

2. A declaration for a libel contained in a letter addressed by the defendant to a correspondent abroad, after the common inducement of good fame, &c., set out the libel with innuendos as follows:—"He (meaning the plaintiff) has now become so inflated with self-importance by the few hundreds made in my (meaning the defendant's) service, God only knows whether honestly or otherwise (thereby then and there meaning to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant), that the fellow's brain is turned:—*Held*, that the latter innuendo was warranted by the libel, although the declaration contained no prefatory averment to give the libel the meaning imputed to it by the innuendo. *Clegg* v. *Laffer*, 727

LITERARY PROPERTY.

The plaintiffs were the owners of the copyright of a work compiled by the defendant, intitled "The Practice of the Court of King's Bench." The defendant had previously contracted to prepare for S. (one of the plaintiffs) and one P. *an edition* of a work on the Practice of the Common Pleas; and, in pursuance of that contract, a small portion of this latter work was sent to the press by the defendant on account of S. & P., containing extracts from the King's Bench Practice in some of the instances wherein the practice of the two Courts was the same. S. and P. being dissatisfied with the progress made by the defendant in the Common Pleas Practice, it was agreed between them that the latter should be released from his engagement, and should refund the purchase money which had already been paid him. The defendant accordingly gave S. and P. a cognovit for the amount, containing a clause that "nothing therein contained should extend to license or permit the defendant to publish or sell any copy or copies of the said intended work" until he should have fully paid the damages and costs therein mentioned. The defendant, in completing the Common Pleas Practice on his own account, embodied therein a large portion of the plaintiff's work on the Practice of the Court of King's Bench. Upon a motion to dissolve an injunction that had been granted to restrain the sale of the Common Pleas Practice on the ground of piracy, the Lord Chancellor directed an action to be brought in this Court to try the question of piracy:—*Held*, that the above clause in the cognovit given in the action be-

tween S. and P. and the defendant, amounted to an implied consent *on the part of the plaintiffs* that the defendant should use their copyright of the King's Bench Practice. *Sweet* v. *Archbold*, 299

LOCAL ACT.

See ACT OF PARLIAMENT.

LOCAL ASSESSMENTS.

A watching and lighting act authorized the commissioners to make a rate upon all persons inhabiting, using, or occupying any houses, shops, mills, sheds, or *other buildings or tenements* within the township:—*Held*, that *sheds* erected to protect engines, for the more convenient working of a coal-mine, were rateable, although it was contended that they were exempt as being merely accessorial to the engines. *Brown* v. *Lord Granville*, 453

LORDS' ACT.

See PRISONER, 4.

MALICIOUS ARREST.

In an action against a defendant for having without reasonable or probable cause preferred a complaint against the plaintiff before a magistrate, and caused him to be imprisoned and held to bail, on a charge of having threatened to do the defendant some bodily harm, the question whether or not there was reasonable or probable cause for the complaint is one of law; but the facts, where they are conflicting, must be first ascertained by the jury. *Venafra* v. *Johnson*, 847

MEMORANDA, 298, 560, 874.

MONEY HAD AND RECEIVED.

Where maintainable.

1. Money had and received is the proper form of action to recover back the consideration paid for an annuity, where the grantor (having for some years paid the annuity without objection) has elected to avoid the annuity by reason of a defective memorial. *Cowper* v. *Godmond*, 219

2. An action for money had and received lies against an official assignee appointed by the Court of Review, to recover money received by him whilst acting under a void commission, and not paid into the Bank of England as directed by the 1 & 2 Will. 4, c. 56, s. 22. *Munk* v. *Clarke*, 463

NEW TRIAL.

See PRACTICE, X.

NON OBSTANTE VEREDICTO.

See COSTS, V.

NOTICE OF ACTION.

The defendant, an officer of the Southwark Court of Requests, entered the plaintiff's house in search of a person against whom a warrant of execution was issued by the commissioners of the Court. The party was not in the house; and the jury found that the defendant had no reasonable grounds for supposing that she was:—*Held*, that, notwithstanding, the defendant was entitled to fourteen days' notice of action under the 21st section of the 46 Geo. 3, c. lxxxvii (Southwark Court of Requests Act), as he entered the house bonâ fide in pursuit of the party named in the warrant. *Cook* v. *Clark*, 371

OFFICIAL ASSIGNEE.

Liability of.

See BANKRUPT, III, 2.

PARISH CLERK.

1. Before the union of parishes effected by the statute 22 Car. 2, c. 11, there was a custom in the parish of St. M. P. for the parishioners to

join with the rector in the election of a parish clerk. By that act the parish of St. M. C. was united to that of St. M. P., the church of the latter remaining:—*Held*, that the right of election after the union continued in the inhabitants jointly with the rector, and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was a void appointment; and consequently that a person so appointed could not maintain trespass against the churchwardens, &c., for forcibly expelling him from the reading-desk of the parish clerk. *Hartley* v. *Cooke*, 230

2. Quære, whether the election should be made by the rector and the inhabitants of both parishes in joint vestry assembled, or by the rector with the inhabitants of St. M. P. alone; and whether the rector should be present at the time of the election, to make the appointment valid? *Ibid.*

PARTNERS.

W. & T., partners, were indebted to the plaintiff, and, after the dissolution of the partnership, T. also became indebted on his separate account to the plaintiff:—*Held*, that, in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items. *Smith* v. *Wigley*, 174

PAYMENT INTO COURT.

See PRACTICE, III.

PIRACY.

See LITERARY PROPERTY.

PLEADING.

I. *Declaration.*

1. The xvth rule of Michaelmas Term, 3 Will. 4 (as to intituling declarations), does not apply to declarations in ejectment. *Doe* d. *Fry* v. *Roe*, 370

2. It is no ground of special demurrer that the plaintiff omits to describe the nature of the action at the commencement of the declaration, pursuant to the rule of Michaelmas Term, 1654. *Marshall* v. *Thomas*, 98

3. By the terms of a charterparty it was stipulated that the freight should be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date." In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charterparty:"—*Held* sufficient, on special demurrer. *Ibid.*

4. A declaration for a libel contained in a letter addressed by the defendant to a correspondent abroad, after the common inducement of good fame, &c., set out the libel with innuendos as follows:—"He (meaning the plaintiff) has now become so inflated with self-importance by the few hundreds made in my (meaning the defendant's) service, God only knows whether honestly or otherwise (thereby then and there meaning to insinuate that the plaintiff had conducted himself in a dishonest manner in the service of the defendant), that the fellow's brain is turned:—*Held*, that the latter innuendo was warranted by the libel, although the declaration contained no prefatory averment to give the libel the meaning imputed to it by the innuendo. *Clegg* v. *Laffer*, 727

5. The defendant, the master of a ship, let the cabins to the plaintiff for the conveyance of passengers from Calcutta to London; and covenanted (amongst other things) that he would promote in as far as in him lay the comfort and convenience of

the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board of the said ship or vessel: and the plaintiff covenanted with the defendant, that if, on the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff to touch or put into any other intermediate port or ports, for stock or otherwise, save and except St. Helena, he the plaintiff would bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon:—*Held*, that a breach alleging that the defendant did not nor would promote so far as in him lay the comfort and convenience of the plaintiff, &c., and that, although it was necessary for the convenience of the plaintiff to touch and put into an intermediate port, and the plaintiff was ready and willing to bear and pay all port and other charges which might be incurred thereby, and requested the defendant to put into the Cape, the defendant refused so to do—was sufficient after verdict. *Corbyn* v. *Leader*, 751

6. By the writ the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—*Held* (on *general* demurrer to a declaration on the bond), to be no variance. *Grettick* v. *Phillips*, 132

7. Quære, if the demurrer had been *special*? *Ibid.*

8. In an action on the case for an excessive distress for rent, the second count alleged, that, the defendants having distrained the plaintiff's goods for rent, the plaintiff tendered the rent in arrear and the costs of the distress, and requested the defendants to redeliver the goods, but that they wrongfully refused to do so or to accept the sum tendered:—*Held*, that this was in *form* and substance a count in case, and was properly joined with others of a like description. *Holland* v. *Bird*, 363

II. *Plea.*

1. In quare impedit, the count stated that the plaintiff was admitted, &c., into the rectory of S. L., and, so being incumbent of the said church, afterwards accepted and was admitted, &c., into the vicarage of O. P., the said vicarage and the said rectory being respectively each of them a benefice with cure of souls; whereby it then and there belonged to the plaintiff as patron to present to the church of S. L.; and that he did present to the late bishop one W. B., a fit person in that behalf, but the bishop refused to admit him. The defendant (the bishop) pleaded, that, before the church of S. L. became vacant after the plaintiff accepted, and was admitted, &c., into the vicarage of O. P. as in the declaration mentioned, the plaintiff conveyed to one J. H. the advowson, &c., of S. L.:—*Held*, that the plea was bad on demurrer, for that it was not competent to the bishop to dispute the title of the patron, at least before collation. *Apperley* v. *The Bishop of Hereford*, 102

2. If a defendant seeks to avail himself of his discharge under the insolvent debtors' act, 7 Geo. 4, c. 57, he must plead it generally, according to the provisions of the 61st section, and cannot give it in evidence under the general issue. *Birchall* v. *Creighton*, 345

3. The declaration charged an assault and battery of the plaintiff, and taking him in custody along certain streets, and imprisoning him on a

false charge of an assault with intent to commit a felony. Plea, that the plaintiff having assaulted the defendant, the latter gave the former in charge of a peace officer, who took him before a magistrate. All the allegations in the count being proved: —*Held*, that the plea was no sufficient answer. *Stammers* v. *Yearsley*, 410

4. To an action on a replevin-bond entered into by the tenant and two sureties, upon a distress for rent, the sureties pleaded that the replevin suit, whilst pending, was referred to an arbitrator, without any notice to or consent of the sureties; that, after enlarging the time, he made his award; and that the sureties were thereby discharged from their obligation:—*Held*, that the plea was bad on demurrer, as the facts therein stated could not be pleaded as a bar to the action, as they amounted to a part discharge only; and that the only plea of discharge from the performance of the condition of the replevin-bond would be a plea of a discharge by writing under seal. *Aldridge* v. *Harper*, 518

5. Replevin for taking and detaining the plaintiff's goods. Avowry, that the plaintiff was an inhabitant of the parish of A., and rateable to the relief of the poor in respect of his occupation of a tenement there; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*; that the defendant, as collector, gave him notice thereof, and demanded payment, which he refused; that he was duly summoned to the Petty Sessions to shew cause why he refused; that he appeared, and shewed no cause; whereupon a warrant was duly made under the hands of two justices of the peace, directed to the defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to the defendant, under which he as collector justified taking the goods as a distress, and prayed judgment and a return. Plea in bar, de injuria sua propria absque tali causa. Special demurrer, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not in a justification and claim of right:—*Held*, that the plea was good—affirming the judgment of the Court below. *Bardons* v. *Selby*, 280.

III. *Replication.*

1. The virtute cujus may be traversed where it involves matter of fact; but not where it involves a mere matter of law. *Lucas* v. *Nockells*, 627

2. In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of fi. fa. sued out on a judgment obtained against the consignor of the goods. The plaintiff replied de injuria sua propria absque residuo causæ, and new assigned that the defendant entered the ship and took the goods for other purposes than those mentioned in the plea:—*Held*, that, on these pleadings, it was competent for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, and under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods—Mr. Justice J. Parke dissentiente. *Ibid.*

POOR-RATE.

See PLEADING, II, 5.

Treble Damages in Replevin on a Distress for, under the 43 Eliz. c. 3, s. 19.

In replevin on a distress for a poor-rate under the 43 Eliz. c. 3, the treble damages given to the defendant by s. 19, are, thrice the amount of the damages found by the jury. The Court refused to stay the proceedings on a judgment of non-pros in such an action, on payment of the *single amount of the rate, thrice the charges of the levy, and the costs.* *Newman* v. *Barnard*, 748

POST OFFICE.

Semble, that the delivery of a letter to the bell-man is a delivery to the Post-office. *Pack* v. *Alexander*, 789

PRACTICE.

See BAIL.—COSTS, III.—WARRANT OF ATTORNEY.

I. *Process.*

1. It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of the Court, it is sufficient, although the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for *signing* as well as for *sealing* such writ. *Burt* v. *Jackson*, 552

2. Where the copy of the process delivered to a defendant on his arrest varies in any degree from the capias, the Court will discharge the party out of custody on filing common bail. *Nicoll* v. *Boyne*, 812

3. The Court discharged a defendant out of custody on entering a common appearance, the writ of capias not describing the cause of action *strictly* according to the form prescribed by the statute 2 Will. 4, c. 39, s. 4, sched. No. 4. *Richards* v. *Stuart*, 774

4. The defendant was arrested under a writ of capias, and discharged out of custody on the ground of a defect in the process. At the time of making the rule absolute for discharging the defendant, the Court gave the plaintiff leave to arrest him again:—*Held*, that it was not necessary to indorse upon the second writ that the defendant therein was arrested by leave of the Court. *Id.* 778

5. It is ordered, that, where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule of Michaelmas Term, 3 Will. 4, s. vi, the defendant must put in bail in the county where he was arrested. Reg. Gen. M. T. 4 Will. 4. And see *Rex* v. *The Sheriff of Essex*, 870

6. The plaintiff obtained judgment against the defendant, and sued out a fi. fa. thereon. The sheriff entered the defendant's house under the writ, but found that his goods were already under distress for rent and taxes, and that he had also made an assignment and executed a bill of sale of all his goods. The officer was thereupon withdrawn, and the plaintiff, without waiting the return of the fi. fa., sued out a ca. sa., under which the defendant was taken. The Court refused to discharge him out of custody. *Dicas* v. *Warne*, 814

II. *Intituling Declaration.*

The xvth rule of Michaelmas Term, 3 Will. 4 (as to intituling declarations), does not apply to declarations in ejectment. *Doe* d. *Fry* v. *Roe*, 370

III. *Payment of Money into Court.*

1. Money cannot be paid into Court in an action where the amount sought to be recovered is not a sum certain or capable of being ascertained by computation: nor can money be paid into Court upon *part of a count.* *Hodges* v. *Lord Litchfield*, 201

2. The plaintiff, in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations:—

Held, that the defendant might have that part of the demand struck out of the declaration, on payment of the sum claimed and costs. *Smith* v. *King*, 799

IV. *Set-off.*

The defendants were the holders of a bill of exchange accepted by one M. for 760*l.* which was indorsed to them by the Commercial Bank of Scotland; and they were also the acceptors of a bill for 1000*l.* drawn by the Commercial Bank in favour of M. The former bill became due on the 6th January, and was dishonoured, M. having stopped payment. On the 7th, the defendants debited the Commercial Bank in their account with them with the 760*l.*, and wrote a receipt on the back of the bill, and returned it protested to the Commercial Bank. The latter, hearing of M.'s failure, on the 6th, wrote to the defendants, requesting them to keep the 760*l.* bill, and set off the amount against the 1000*l.*, their acceptance, which would become due on the 12th. In an action by the assignees of M. (who afterwards became bankrupt) against the defendants, as acceptors of the 1000*l.* bill:—*Held*, that they were not entitled to set off the 760*l.* *Belcher* v. *Lloyd*, 822

V. *Discontinuance.*

1. A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the Court on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this Court. The Court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. *Paterson* v. *Powell*, 195

2. The defendant was arrested under a writ of capias, and discharged out of custody on the ground of a defect in the process. The plaintiff took out a side-bar rule to discontinue the first writ, and paid the defendants' costs thereon:—*Held*, that the discontinuance of the writ (that being the only step taken in the cause) was a discontinuance of the action. *Richards* v. *Stuart*, 778

VI. *Interpleader.*

1. The sheriff having seized the defendant's goods, under a fi. fa. sued out at the suit of the plaintiff:—*Held*, that there must be an actual claim to the goods, which might be followed by an action, before the sheriff could be entitled to relief under the interpleader act, 1 & 2 Will. 4, c. 58. *Isaac* v. *Spillsbury*, 341

2. A lien attaching upon the goods in dispute does not prevent the party who holds them from applying to the Court for relief under the interpleader act. *Cotter* v. *The Bank of England*, 180

3. A party fairly applying for relief under the interpleader act is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute. *Ibid.*

VII. *Inspection of Documents.*

1. The Court will not on motion compel a person not a party to the suit to produce for inspection a deed which he holds as a mere trustee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it. *Cocks* v. *Nash*, 164

2. Nor will the Court exercise their authority in this respect over an attorney, where the deed has not come into his hands by virtue of his professional character. *Ibid.*

3. In an action of slander imputing to the plaintiff that he was the writer of a scandalous letter reflecting upon the defendant, the latter in one of his pleas set forth the letter and justified the words spoken. The Court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to shew that it was not in his handwriting. *Curtis* v. *Curtis*, 819

VIII. *Rule to reply, &c.*

By the 54th rule of Hilary Term, 2 Will. 4, service of a rule to reply or plead any subsequent pleading is necessary. *Pound* v. *Lewis*, 210

IX. *Setting aside and staying Proceedings.*

1. A motion to set aside the service of a writ of summons on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the distringas is issued, must be made within a reasonable time after the service thereof. *Wright* v. *Warren*, 103

2. Semble, that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier. *Ibid.*

3. Where a writ of summons which had originally been issued into one county was afterwards (without being re-sealed) altered by the substitution of another,—The Court set aside the proceedings, on payment of the debt *without costs*, although the defendant had, before taking the objection, obtained a Judge's order for staying the proceedings on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of Court. *Siggers* v. *Sawsom*, 194

4. The Court refused to order the proceedings in a writ of right to be stayed until payment to the tenant of the costs of two actions of ejectment which had been brought in the King's Bench for the recovery of the same premises, and in which actions the demandant had failed. *Bowyear*, dem.; *Bowyear*, ten., 65

5. Where a writ of scire facias has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself. *Williams* v. *Brown*, 218

6. The plaintiff demised to the defendants certain machinery and premises at a yearly rent; the lease containing a proviso that the defendants should be at liberty to retain the rent, or any part thereof, upon giving the plaintiff a bond conditioned for the payment at the end of the term of the sum so retained, with interest. The defendants being in arrear for five quarters, and having omitted to give the bond, the plaintiff brought actions for the recovery of the amount. The Court refused to stay the proceedings on the terms of the defendants' giving a bond and paying the costs of the actions. *Jones* v. *Wingfield*, 846

X. *New Trials.*

1. Semble that the rule laid down by the Courts at Westminster as to new trials where the sum recovered is less than 20*l.*, applies to causes tried in the sheriff's court. *Henning* v. *Samuel*, 818

2. In an action on the case in the nature of waste against eighteen defendants, two of them, N. and P., suffered judgment by default; a nolle prosequi was entered as to N.; and at the trial the jury found a verdict for all the defendants except P., assessing the damages against him at 900*l.* The Court, being dissatisfied with the verdict in favour of one of the defendants, granted a new trial as to him, on payment of the costs of all the defendants except P.; and also directed a re-assessment of damages as to P., with a proviso that on such re-assessment the damages against

him should not exceed the 900*l.* *Price* v. *Harris*, 398

XI. *Execution.*

In trover for goods, the plaintiffs obtained a verdict for the value. The landlord of the premises on which the goods were afterwards distrained for rent, which became due before the defendants took possession of the goods. The defendants having paid the rent—The Court ordered that the sum so paid should be deducted from the amount of the verdict, and the execution restrained to the residue. *Plevin* v. *Henshall*, 403

XII. *Miscellaneous.*

1. On special arguments, where either party has neglected to mark the points to be argued, in obedience to the rule of T. T. 1 Geo. 4 (C. P.), the Court will not allow the case to be argued, but will give judgment against the party guilty of the neglect. *Grottick* v. *Phillips*, 135

2. The defendant having obtained a special jury, the cause was called on for trial at the Assizes for Somerset, when four special jurors only being in attendance, and the plaintiff and defendant refusing to pray a tales, the cause stood over to the following Assizes. In the mean time the defendant became a prisoner in the Fleet. The Court, on his application, permitted the cause to be tried in London, at the first Sittings after the term in which the application was made. *Keys* v. *Smith*, 338

3. Two creditors of an insolvent were appointed trustees under a composition deed. One of them never executed the deed, and the other brought an action of replevin in their joint names without the consent of the former. On an application by him to have his name struck out as a co-plaintiff, the Court refused to interfere, there being no suggestion of fraud. *Emery* v. *Mucklow*, 384

PRESUMPTIONS.

J. H., being seised in fee tail in possession of certain premises, and being also seised of the immediate reversion in fee, infeoffed his brother R. H. thereof in fee. R. H. never took possession, and the deed of feoffment remained in the custody of the feoffor. J. H., the feoffor, died in 1780, whereupon his son Robert entered, and the premises continued to be occupied by him and his lessees down to the year 1826, when he died, having in the mean time suffered a recovery of the premises, and devised them to the lessor of the plaintiff:—*Held*, that this long uninterrupted possession by the feoffor, and those claiming under him, warranted the presumption that the premises had been re-conveyed to the feoffor. *Tenny* v. *Jones*, 472

PRISONER.

1. Time for declaring against a defendant in custody under a writ of capias or detainer. *See* Reg. Gen., III.

2. Time and manner of pleading by prisoners. *See* Reg. Gen., III.

3. Since the statute 2 Will. 4, c. 39, s. 8, it is not necessary to remove by habeas corpus a prisoner in the custody of the Marshal of the King's Bench, to the custody of the Warden of the Fleet, in order to declare against him in the Court of Common Pleas, where the action is commenced by writ of summons or capias under the authority of that act. *Millard* v. *Millman*, 63

4. The defendant having obtained a special jury, the cause was called on for trial at the Assizes for Somerset, when four special jurors only being in attendance, and the plaintiff and defendant refusing to pray a tales, the cause stood over to the following Assizes. In the mean time the defendant became a prisoner in the Fleet. The Court, on his application, per-

mitted the cause to be tried in London, at the first Sittings after the term in which the application was made. *Keys* v. *Smith*, 338

Under the Lords' Act.

5. The twenty days' notice required to be given before bringing up a prisoner under the compulsory clauses of the Lords' act, must expire before the first day of the term in which he is brought up. *Hayward* v. *Priest*, 388

Under the 48 *Geo.* 3, *c.* 123.

6. A person who has lain in prison twelve months under an execution sued out on a judgment for a less sum than 20*l.* is entitled to his discharge under the statute 48 Geo. 3, c. 123, although he had sufficient property at the time of the application to satisfy the judgment, and although several other detainers were lodged against him by other creditors. *Manser* v. *Piercy*, 558

7. A prisoner charged in execution for a debt exceeding 20*l.*, though the excess be made up of interest upon a sum originally less than 20*l.*, is not entitled to his discharge after being in custody twelve months, under the statute 48 Geo. 3, c. 123. *Cooper* v. *Bliss*, 797

PROMOTIONS, 298.

QUARE IMPEDIT.

In quare impedit, the count stated that the plaintiff was admitted, &c., into the rectory of S. L., and, so being incumbent of the said church, afterwards accepted and was admitted, &c., into the vicarage of O. P., the said vicarage and the said rectory being respectively each of them a benefice with cure of souls; whereby it then and there belonged to the plaintiff as patron to present to the church of S. L.; and that he did present to the late bishop one W. B., a fit person in that behalf, but the bishop refused to admit him. The defendant (the bishop) pleaded, that, before the church of S. L. became vacant after the plaintiff accepted, and was admitted, &c., into the vicarage of O. P. as in the declaration mentioned, and before the plaintiff presented the said W. B. in the declaration mentioned, the plaintiff conveyed to one J. H. the advowson, &c., of S. L.:—*Held* —first, that the plea was bad on demurrer, for that it was not competent to the bishop to dispute the title of the patron, at least before collation—secondly, that, to avoid the first living, it was not necessary that it should appear on the face of the count that it was of the value of 8*l.* a year or more in the king's books—thirdly, that, the patron being himself the incumbent, no sentence of deprivation was necessary to render the first living void. *Apperley* v. *The Bishop of Hereford*, 102

RECEIVER.

In ejectment on a vacant possession, the affidavit that six months' rent are in arrear may be made by a receiver. *Anonymous*, 751

REGULÆ GENERALES.

I. *Bail.*

It is ordered, that, where a defendant is arrested upon an alias or pluries capias issued into another county pursuant to the rule of Michaelmas Term, 3 Will. 4, c. vi., the defendant must put in bail in the county where he was arrested. *Mo. T.* 4 *Will.* 4.

It is ordered, that, from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made and notice

thereof given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only. *T. T. 3 Will.* 4.

II. *Costs.*

It is ordered, that henceforth the costs of proceedings upon writs of error from the Court of Exchequer to the Exchequer Chamber be taxed and allowed by the Master of the Court of Exchequer. *M. T. 2 Will.* 4.

III. *Prisoners.*

It is declared and ordered, that, in all cases in which a defendant shall have been or shall be detained in prison on any writ of capias or detainer under the statute 2 Will. 4, c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the statute 2 Will. 4, c. 39, Schedule, No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge. *T. T. 3 Will.* 4.

It is ordered, that, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody. *T. T. 3 Will.* 4.

IV. FINES AND RECOVERIES.
See p. 871.

REPLEVIN.
See PLEADING, II, 4, 5,—POOR-RATE.

REQUESTS, COURT OF.
See COSTS, II.

RESCUE.
See SHERIFF, II.

SCIRE FACIAS.
See PRACTICE, IX, 5.

SET-OFF.
See PRACTICE, IV.

SETTLEMENT.
See DEED.

SHERIFF.

I. *Duties and Liabilities of.*

1. The sheriff seized the goods of a defendant under a fi. fa., and sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:—*Held*, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen. *Balme* v. *Hutton*, 1

2. An insolvent went to prison on the 18th of June, and on the following day petitioned the insolvent court for his discharge. On the 19th the sheriff seized his goods under a fi. fa. issued on a cognovit given by the insolvent to a creditor on the 11th. On the 23rd, the insolvent executed the assignment to the provisional assignee, who immediately gave the sheriff notice not to sell, notwithstanding which he did so:—*Held*, that the sale was a wrongful act by the sheriff, and that he was liable to the ultimate assignee in an action of trover. *Groves* v. *Cowan*, 352

3. The sheriff seized goods under a writ of fi. fa. on the 16th June, and

remained in possession, taking no steps to effect a sale, though urged so to do by the plaintiff's attorney. On the 5th of October, a commission of bankrupt was sued out against the debtor, and the goods were delivered up by the sheriff to the assignees under an indemnity, and *nulla bona* returned to the fi. fa. Quære whether, under these circumstances, the sheriff is not liable to an action on the case at the suit of the execution-creditor, for the loss of the fruits of the judgment. *Aireton* v. *Davis*, 188

4. Where the sheriff has neglected to comply with rule iv. of Michaelmas Term, 3 Will. 4, by indorsing on the writ of capias the day of its execution, the party's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return. *Moore* v. *Thomas*, 810

II. *Rescue.*

The sheriff having returned a rescue of a party arrested from his bailiff, instead of himself, the Court notwithstanding granted a rule absolute in the first instance for an attachment against the rescuers. *Gobbey* v. *Dewes*, 556

SHIP AND SHIPPING.

By the terms of a charterparty it was stipulated that the freight should be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date." In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charterparty:"—*Held*, sufficient on special demurrer. *Marshall* v. *Thomas*, 98

SPECIAL ARGUMENTS.

On special arguments, where either party has neglected to mark the points to be argued, in obedience to the rule of T. T. 11 Geo. 4 (C. P.), the Court will not allow the case to be argued, but will give judgment against the party guilty of the neglect. *Grottick* v. *Phillips*, 135

STATUTES.

DECISIONS ON.

25 Edw. 3, st. 3, c. 7.

Ecclesiastical Law. . . . 102

25 Hen. 8, c. 11.

Ecclesiastical Law. . . . 102

43 Eliz. c. 3, s. 19.

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21 Jac. 1, c. 16.

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28 Geo. 3, c. 30.

Theatrical Performance—Unlicensed Theatre. 511

39 & 40 Geo. 3, c. civ.

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43 Geo. 3, c. 46, s. 3.

Costs—On arrest without reasonable or probable Cause, 184, 801

46 Geo. 3, c. lxxxii.

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s. 61. ——— — Plea of Insolvency. 345

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Limitation of Action. . 219

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s. 22. ——— — Duty and Liability of Official Assignee. 463

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Costs. 174, 180

2 Will. 4, c. 39.
s. 4. Process — Description of Cause of Action in. . . . 774
s. 8. Prisoner—Declaring against. 63

STATUTE OF FRAUDS.

The plaintiff built a wagon for the defendant. The latter employed a smith to affix thereon the iron work, and a tilt-maker to put on a tilt. The wagon remaining in the possession of the plaintiff:—*Held*, that the affixing of these articles to it was not a sufficient acceptance of the wagon by the defendant to satisfy the statute of frauds. *Maberley* v. *Sheppard*, 432

STATUTE OF LIMITATIONS.

The statute of limitations is no bar to an action brought to recover back the consideration paid for an annuity, notwithstanding more than six years have elapsed since the date of the grant, where the grantor (having for some years paid the annuity without objection) has, within six years from the commencement of the action, elected to avoid the annuity by reason of a defective memorial. *Cowper* v. *Godmond*, 219

TAXATION.

See Costs, I.

THEATRICAL PERFORMANCE.

The plaintiff and defendant entered into an agreement to become equal sharers in the profits to be derived from acting operas and ballets in an unlicensed theatre of the defendant's. The plaintiff having advanced sums for dresses, and for the conveyance of dancers to the theatre, at the request of the defendant:—*Held*, that the plaintiff could not recover the sums so paid; on the ground that a contract made in contravention of the provisions of a statute cannot be made the subject of an action. *De Begnis* v. *Armistead*, 511

TOLLS.

See Turnpike Roads.

TRESPASS.

See Pleading, II, 3.—III, 2.

Before the union of parishes effected by the statute 22 Car. 2, c. 11, there was a custom in the parish of St. M. P. for the parishioners to join with the rector in the election of a parish clerk. By that act, the parish of St. M. C. was united to that of St.

M. P., the church of the latter parish remaining:—*Held*, that the right of election after the union continued in the inhabitants jointly with the rector, and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was a void appointment; and consequently that a person so appointed could not maintain trespass against the churchwardens, &c., for forcibly expelling him from the reading-desk of the parish clerk. *Hartley* v. *Cooke*, 230

TROVER.

1. The sheriff seized the goods of a defendant under a fi. fa., and sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:—*Held*, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen. *Balme* v. *Hutton*, 1

2. The plaintiff was robbed of bank-notes to a large amount at a public meeting. The loss was duly advertized, and payment of the notes stopped at the Bank. Nearly two years afterwards one of the notes (for 200*l.*) was traced to the defendant, who was unable to give any account as to the manner in which he became possessed of it, except that he believed he had received it from a stranger on the settlement of a bet on the Derby stakes:—*Held*, that the plaintiff was entitled to recover the value of the note in trover; and that his imprudence in going to a public meeting with so large a sum of money on his person afforded no excuse for the subsequent negligence and want of proper caution on the part of the defendant in taking a note of that amount from a stranger, without due inquiry. *Easley* v. *Crockford*, 700

TRUSTEES.

See TURNPIKE ROADS.

TURNPIKE ROADS.

By the 3 Geo. 4, c. 126, s. 81, the trustees or commissioners of any turnpike road are empowered to borrow money at interest on the credit of the tolls arising on such road, and to mortgage the tolls and toll-houses as a security for such advances: by the 4 Geo. 4, c. 95, s. 61, the trustees are exonerated from personal responsibility in consequence of having signed any mortgage or other security "to be made by virtue or in pursuance of any act for making or maintaining any turnpike road:" and by the 7 & 8 Geo. 4, c. 24, s. 3, it is provided that no trustee shall be personally charged with the payment of any money expended in the making, repairing, or altering any turnpike road, nor shall execution issue against the goods and chattels of any trustee by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, *unless in such contract or security such trustee shall have in express words rendered himself so personally liable.* The defendant, chairman of the trustees of a turnpike road, applied to the plaintiff, the treasurer of the road, to advance to the trust 2000*l.* as a *temporary loan:* the plaintiff placed the sum required to the credit of the trustees; but he received no such security as is provided by the 81st section of the 3 Geo. 4, c. 126:—*Held*, that the defendant was not exempted from personal liability by the 7 & 8 Geo. 4, c. 24, s. 3, the money not having been borrowed on the credit of the tolls in

the manner prescribed by the statutes. *Parrott* v. *Eyre*, 857

VARIANCE.

See PRACTICE, I, 2, 3.

Between Process and Bail-Bond.

1. By the writ the sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action of assumpsit at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—*Held* (on *general* demurrer to a declaration on the bond) to be no variance. *Grottick* v. *Phillips*, 182

2. Quære, if the demurrer had been *special?* *Ibid.*

WAIVER.

Appearing to oppose a rule does not waive an objection to the form of the affidavit upon which the rule was obtained—such as, the omission of the Christian name of one of the parties in the title of the cause. *Clothier* v. *Ess*, 216

WARRANT OF ATTORNEY.

I. *Filing.*

1. Where a copy of a warrant of attorney has been filed under the authority of the statute 3 Geo. 4, c. 39, such copy is good evidence of the contents of the warrant of attorney—at least against the party filing it, and all claiming under him. *Sylvester* v. *Anthony*, 191

2. By the statute 3 Geo. 4, c. 39, a warrant of attorney not filed within twenty-one days of its execution is declared to be fraudulent and void against the assignees under a commission afterwards sued out against the party giving it:—*Held*, that, in order to let in the objection that the statute has not been complied with, it must first appear that there is a *valid* commission against the party. And *semble* that it lies upon him who seeks to impeach it, to shew that the warrant of attorney was not filed. *Aireton* v. *Davis*, 138

II. *Entering up Judgment on.*

1. Judgment cannot be entered up against husband and wife on a warrant of attorney given by the wife dum sola, without leave of the Court. *Staples* v. *Purser and Wife*, 800

2. The Court allowed judgment to be entered up on an old warrant of attorney, on an affidavit that a letter had been received from the party, the twopenny post date on which was within the term. *Anonymous*, 210

3. An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it; that he saw the defendant execute it; and that the attesting witness was also present, but was now residing in France; and that the defendant was alive:—*Held*, sufficient to entitle the plaintiff to enter up judgment. *Taylor* v. *Leighton*, 423

WATCHING AND LIGHTING.

See ACT OF PARLIAMENT.—LOCAL ASSESSMENTS.

WHARFINGER.

Wharfingers' Receipts.

See CARRIER.

WILL.

See DEVISE.

WRIT OF RIGHT.

I. *Casting an Essoin.*

In a writ of right the process was returnable in eight days of St. Hilary; the tenant on that day cast an essoin, and gave the demandant a rule to adjourn it till the 12th April, in Easter Term, a period embracing

five returns: the demandant not having adjourned the essoin, the tenant on the 14th January signed judgment of non-pros:—*Held*, that the judgment was irregular, inasmuch as the rule to adjourn gave the demandant a more distant day than the law allowed. *Twyning*, dem., *Lowndes*, ten., 443

II. *Ne recipiatur.*

Quære, whether it was necessary for the tenant to enter a ne recipiatur with the clerk of the essoins before signing judgment? *Twyning*, dem., *Lowndes*, ten., 443

III. *Tender of the Demi-mark.*

On the trial of a writ of right, where the mise was joined on the mere right, the tenant was required to begin by shewing his title to the premises, notwithstanding his having tendered the demi-mark at the swearing of the grand assize. *Spires*, dem., *Morris*, ten., 118

IV. *Staying Proceedings.*

The Court refused to order the proceedings in a writ of right to be stayed until payment to the tenant of the costs of two actions of ejectment which had been brought in the King's Bench for the recovery of the same premises, and in which actions the demandant had failed. *Bowyear*, dem., *Bowyear*, ten., 65

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